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Ontario
Labour Relations
Board

Decisions

January 82

REPORT
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ONTARIO LABOUR RELATIONS BOARD

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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1982] OLRB REP. JANUARY

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2007-81-R Canadian Union of Operating Engineers and General Workers, Applicant, v. Blue Line Taxi Co. Limited, Respondent

Bargaining Unit – Parties agree on unit restricted to bus drivers – Board previously having accepted similar agreement – Respondent having recognized another unit restricted to classifications – Whether these factors causing Board to accept bus drivers unit

BEFORE: R. D. Howe, Vice-Chairman and Board Members J. D. Bell and O. Hodges.

DECISION OF THE BOARD; January 13, 1982

1. This is an application for certification.

• • •

3. The applicant has requested that a pre-hearing representation vote be taken.

4. With respect to the voting constituency and bargaining unit description, the applicant, which initially requested a unit consisting of all bus drivers employed by the respondent in Ottawa, Ontario, modified its request at the pre-hearing vote meeting so as to propose the following voting constituencies and bargaining units:

“All bus drivers of the respondent in the City of Ottawa, save and except supervisors persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period;

All bus drivers of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period in the City of Ottawa, save and except supervisors and persons above the rank of supervisor.

The respondent, which had requested the exclusion of part-time employees and students, agreed that if there were to be two bargaining units, the above descriptions would be appropriate. In accordance with its normal policy, the Board will place persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, in a unit separate from other employees. However, the Board is somewhat concerned about the restrictive bargaining unit descriptions, confined to “bus drivers”, to which the parties have agreed. As stated by the Board in *Kaneff Properties Limited*, [1981] OLRB Rep. June 730, at para. 4:

“The Board does not generally consider bargaining units consisting of particular classifications or departments to be appropriate. The rationale for this approach is set forth as follows in *The Corporation of the City of Barrie*, [1974] OLRB Rep. Nov. 813, at paragraph 8:

‘...bargaining units consisting of particular classifications or departments are not generally considered by the Board to be appropriate unless, of course, they constitute the extent of the

employer's work force and even then the description of the bargaining unit would not refer to the classification(s) or department(s) but would be in terms of 'all employees'; (see *Board of Education for the City of Toronto* [1965] OLRB Rep. 125 (May); *International Harvester Co. of Canada Ltd.* [1962] OLRB Rep. 372 (Dec.); and *Rainee Manufacturing Products Ltd.* [1968] OLRB Rep. 259 (June). Were the Board to act otherwise, the working force of an employer might become fragmented into a number of bargaining units and this in turn could lead to jurisdictional disputes between bargaining units, more numerous negotiations and, therefore, potentially more industrial conflict. In other words, the Board believes that the undue fragmentation of bargaining units is likely to contribute to industrial [in]stability and therefore it has refused to find such isolated groups of employees as constituting units appropriate for collective bargaining; (see *Corp. of the Township of Markham* [1969] OLRB Rep. 592; and *Tamco Limited*, Board File No. 6347-74-R).'

5. Information provided to the Board Officer at the pre-hearing vote meeting indicates that the remaining groups of employees employed by the respondent are office, clerical and technical staff; dispatchers, telephone operators and shift supervisors; single-plate owners and single-plate lessees; taxi and limousine drivers; and garage, gas bar and car wash employees. It appears that the respondent voluntarily recognized the applicant on December 10, 1981 as bargaining agent for its "single-plate owners and single-plate lessees". By decision dated January 11, 1982 in File No. 1864-81-R, the Board certified the applicant as bargaining agent for the following bargaining unit:

"All employees of the respondent [Blue Line Taxi Co. Limited] in Ottawa, Ontario, employed as dispatchers, telephone operators and shift supervisors, save and except operations manager and persons above the rank of operations manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period".

In that application, by which the present applicant displaced the Ontario Taxi Association Local 1688 C.L.C. ("Local 1688") the Board, in accordance with its normal practice in displacement applications, accepted the agreement of the parties with respect to the (revised) bargaining unit description upon being assured by the three parties to that application that the same employees were covered by that revised description as were covered by the bargaining unit description contained in the collective agreement (that expired on December 31, 1981) between the respondent and Local 1688 (namely, "all dispatchers and dispatch office telephone operators of Blue Line Taxi Company Limited within the meaning of the Labour Relations Act as presently in force in the province of Ontario"); see the Board's decision dated December 14, 1981 in that matter (File No. 1864-81-R). The Board also noted in that decision (dated December 14, 1981) that the (revised) bargaining unit description to which the parties had agreed was identical to the bargaining unit found to be appropriate by the Board in its decision dated August 11, 1980 in File No. 0611-80-R. In that decision concerning an application for certification by Local 1688, the Board stated:

"4. In view of the disagreement between the parties as to the

appropriate bargaining unit, the Board appointed a Labour Relations Officer to meet with the parties. At that meeting the parties reached the following Agreement:

Agreement of the Parties

In the above matters the parties hereby agree to resolve their differences regarding the bargaining unit descriptions in the following manner:

- 1) All employees of the Respondent in Ottawa, Ontario employed as dispatchers, telephone operators, and shift supervisors, save and except operations manager and persons above the rank of operations manager, persons regularly employed for not more than 24 hours/week, and students employed during the school vacation period. (Clarity Note: It is agreed that the classification of airport dispatcher/supervisor is an exclusion from the bargaining unit by reason of managerial function (section 1(3)(b)).
- 2) All office, clerical and technical employees of the Respondent in Ottawa Ontario, save and except department heads and persons above the rank of department head, persons regularly employed for not more than 24 hours/week, and students employed during the school vacation period.
- 3) All employees of the Respondent in Ottawa, Ontario employed as bus drivers, maintenance and mechanical staff, gas bar attendants, save and except the garage manager and those above the rank of garage manager, persons regularly employed for not more than 24 hours/week, and students employed during the school vacation period.
- 4) By agreement of the parties, the schedules for Board File 0611-80-R have been amended as follows:

B. McKay (#7 on B) has been deleted from Schedule B and added to Schedule A.
- 5) By further agreement of the parties, the Applicant hereby requests leave of the Board to withdraw its application for certification (Board File 0659-80-R) without prejudice or penalty.
- 6) The parties further agree to request the Board to determine the membership evidence in support of the application for certification in Board File 0611-80-R and make a decision in this matter. The bargaining unit in this application is given in item 1 above.

- 7) In view of the above understanding, the parties hereby waive formal examination and report by a Labour Relations Officer.

Dated at Ottawa, this 29th day of July, 1980.

"Jack McDowell"
"Tom Christou"

For the Applicant

"Wayne French"

For the Respondent

5. Having regard to the agreement of the parties the Board finds that all employees of the respondent in Ottawa, Ontario employed as dispatchers, telephone operators, and shift supervisors, save and except operations managers and persons above the rank of operations manager, persons regularly employed for not more than 24 hours/week, and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining."

The Board's acceptance of the bargaining unit agreed upon by Local 1688 and the respondent in that case reflects a recognition by the Board that in some circumstances the parties to applications that involve complex issues pertaining to bargaining unit descriptions may be in the best position to fashion practicable bargaining unit descriptions suited to the unique operations of a particular employer. Although the bargaining unit descriptions to which the parties have agreed in the present case are somewhat more restrictive than the description accepted by the Board in File No. 0611-80-R, having regard to all of the circumstances, including the respondent's voluntary recognition of the applicant as bargaining agent for its "single-plate owners and single-plate lessees" and the reliance factor that may have been created by the Board's acceptance of the agreement of the parties in File No. 0611-80-R, the Board will accept the agreement of the parties with respect to the voting constituency and bargaining unit descriptions in the circumstances of the present case.

6. It appears to the Board on an examination of the records of the applicant and the records of the respondent that not less than thirty-five per cent of the employees of the respondent in each of the voting constituencies hereinafter described were members of the applicant at the time the application was made.

7. Having regard to the agreement of the parties, the Board directs that pre-hearing representation votes be taken of the employees of the respondent in each of the following voting constituencies:

"Voting Constituency #1

All bus drivers of the respondent in the City of Ottawa, save and except supervisors and persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.

Voting Constituency #2

All bus drivers of the respondent regularly employed for not more than

24 hours per week and students employed during the school vacation period in the City of Ottawa, save and except supervisors and persons above the rank of supervisor.

8. All employees of the respondent in the voting constituencies on the 29th day of December, 1981, who have not voluntarily terminated their employment or who have not been discharged for cause between the 29th day of December, 1981, and the date the vote is taken will be eligible to vote.
9. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.
10. The matter is referred to the Registrar.

1490-81-U Canadian Union of United Brewery, Flour, Cereal, Soft Drinks and Distillery Workers, Complainant, v. Charterways Transportation Ltd., Respondent

Discharge for Union Activity – Unfair Labour Practice – Bus driver terminated – Whether discharged because of poor driving record or union activity – Whether employer's policy on preventable accidents used as pretext

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members W. H. Wightman and C. A. Ballentine.

APPEARANCES: *John McNamee for the applicant; J. P. Wearing and W. Heslop for the respondent.*

DECISION OF KEVIN M. BURKETT, ALTERNATE CHAIRMAN AND BOARD MEMBER C. A. BALLENTINE; January 12, 1982

1. This is a complaint filed under section 89 of *Labour Relations Act* alleging that the dismissal from employment of Ms. D. Fowler on or about October 7, 1981, constitutes a violation of sections 64 and 66 of the Act.

• • •

3. The company operates a school bus and charter service from 16 locations in Ontario and is party to collective agreements with various unions covering employees at a number of these Locations. Donna Fowler was employed at the company's Mississauga location as a bus driver from May 7, 1981 until the date of her discharge; a period of some five months. The 150 odd employees at the Mississauga operation are unorganized although a union organizing campaign was in progress at the time of her discharge. An application for certification was filed on November 18, 1981. The reason given for her discharge was that she had three preventable accidents in the short period of her employment. A preventable accident is defined

by the company as any accident resulting in property damage or personal injury in which the operator of the vehicle has failed to do everything to prevent the accident. Mr. Andy Hoornweg, the general manager of the Mississauga operation, testified that after two preventable accidents it is company policy to dismiss an employee but that some drivers have had three preventable accidents before being dismissed. Mr. William Heslop, the general manager of the bus division, testified that two preventable accidents provide just cause for dismissal while three preventable accidents result in immediate dismissal. The evidence is that there are no employees with the company who have had three preventable accidents.

4. Ms. Fowler, who failed her class B licence test (a class B licence is required to operate a school bus) three times before obtaining her licence in May, had three accidents while operating company vehicles during the course of her employment. The reports filed by Ms. Fowler in respect of each of these accidents and the manager's follow-up reports, were placed in evidence. The first accident report placed in evidence by the company is dated June 29, 1981 and describes an accident which occurred on June 26, 1981. The driver's description of the accident states that while proceeding on Flemington, "I heard squealing of tires rubber. I looked in my rear view side mirror. I saw a blue car come screaming out of Amaranth and to avoid an accident I swerved and hit a light pole — breaking my mirror." Ms. Fowler was transporting senior citizens to a bingo at the time. The manager's accident follow-up report, which was signed by Mr. Hoornweg, shows that Ms. Fowler was interviewed by Evan Weston, her route supervisor, and cautioned on defensive driving procedure. The report shows that she had had no previous preventable or non-preventable accidents. The second accident report placed in evidence by the company is dated July 18, 1981 and relates to an accident which occurred on the same date. Ms. Fowler was proceeding south on Islington preparing to make a left turn on to Golfdown when the bus she was driving struck the rear of an automobile proceeding in the same direction. The driver of another Charterways bus, who had cut off the driver of the automobile which Ms. Fowler hit, was charged by the police in connection with this accident while Ms. Fowler was not. The manager's accident follow-up report, as with the one dated June 26, 1981, is signed by Mr. Hoornweg and shows that Ms. Fowler had not been involved in any previous preventable or non-preventable accidents. The third accident report tendered in evidence by the company is dated October 5, 1981 and relates to an accident which occurred on that date. Ms. Fowler, in coming to a stop, misjudged the distance between her bus and another vehicle and hit the mirror of the other vehicle. The manager's accident follow-up report dated October 6, 1981 and signed by Mr. Hoornweg, states that the driver had been suspended for 3 days pending an investigation; that the driver has been involved in previous preventable accidents; that the accidents which occurred on June 26, 1981 and July 18, 1981 were preventable. There were no passengers in her bus when Ms. Fowler had her second and third accidents.

5. Mr. Brian Beggs, a former 12 year veteran of the London city police and the assistant director of traffic and safety for the company, visited the Mississauga office as part of his routine on October 8, 1981. It is his evidence that he was handed the accident report filed on October 5, 1981 and was advised that the driver had now been involved in three accidents. He asked for and was supplied with the other accident reports and testified that he determined that all three accidents were preventable. The company's evidence is that the failure to note on the second follow-up report that the first accident was preventable was a clerical mistake. Mr. Beggs advised Mr. Hoornweg that the driver should be dismissed. Ms. Fowler, who was under suspension at the time, was called in by Mr. Evan Weston and discharged from her employment.

6. In addition to her accident record the company also relied on an "Employee Warning/ Discharge Notice" which was in Ms. Fowler's personnel file at the time. The notice, dated September 30, 1981, relates to a complaint allegedly made by a senior citizen who was a passenger on one of her bingo runs. The notice states:

"A very careless driver, poor attitude with bingo passengers — playing radio too loud."

7. Ms. Fowler testified that she had been active in the union's organizing campaign since August. She testified that she had been present at the collectors' meeting the first week in September along with about five others, had knocked on doors seeking support for the union and had signed employees into membership. An examination of the cards submitted in support of the application for certification which was filed on November 18, 1981, reveals that she acted as collector in respect of 3 of the 56 cards filed in support of the application. Ms. Fowler signed a membership card herself on September 5, 1981. Only two other employees signed cards at an earlier date.

8. Ms. Fowler testified that the accident and follow-up reports dated July 18, 1981 are in respect of an accident which occurred on June 18, 1981 and not July 18, 1981 as shown on the reports. She explained that she had mistakenly filled in the wrong month on the accident report. This was the accident in which another Charterways driver was charged by the police with making an improper lane change. There was no evidence called to dispute Ms. Fowler's contention as to the actual date of this accident. It is her evidence that at the time Evan Weston told her that this accident was non-preventable. Mr. Weston admitted that he had told Ms. Fowler at the time that the accident was non-preventable but maintained that he later told her that the company had deemed it preventable. There is no written record of this advice ever having been given. Ms. Fowler denied that she had been advised at any time prior to October 7th that the accidents in which she had been involved were preventable. As we have noted, the follow-up report in respect of the June 26th accident, which was in fact her second accident, stated that she had not been involved in any previous preventable or non-preventable accidents. Ms. Fowler testified that when she called in to report the details of her second accident (June 26th) Ms. Wendy Mathews, the dispatcher, told her not to worry that it happens all the time. Ms. Mathews was not called to testify. Ms. Fowler testified that Evan Weston did not advise her that this accident was preventable. When it was put to Mr. Weston in cross-examination he could not recall if he had informed Ms. Fowler of Mr. Hoornweg's decision that this accident was preventable. He admitted that when he informed Ms. Fowler on October 7th that she had three preventable accidents she was surprised.

9. After reporting the October 5, 1981 accident Ms. Fowler was interviewed by Evan Weston on Wednesday, October 8th. She was told by Mr. Weston that she was being suspended for three days while the company investigated her accident record. As we have noted it is Ms. Fowler's evidence that this is the first time she was ever told that the previous two accidents had also been classified as preventable. She testified that in the course of their discussion concerning her previous accidents, Mr. Weston told her of his experience at Wilson's Transport where the Teamsters had attempted to organize the drivers but had been unsuccessful. Mr. Weston recalled making the reference to the unsuccessful organizing campaign of the Teamsters at Wilson's Transport but could not recall the context in which it had been made. The evidence is that Ms. Fowler then asked Mr. Weston if he was aware that a union organizing campaign was going on at Charterways, to which Mr. Weston replied that he

could not talk about it. It is Mr. Weston's evidence that Ms. Fowler also identified herself as a union supporter. Both Mr. Hoornweg and Mr. Weston admitted to having heard rumours of a union organizing campaign but denied any knowledge of the grievor's involvement.

10. Mr. Hoornweg referred in his evidence to the "Employee Warning/Discharge Notice" dated September 30, 1981 (described at para. 6 herein) which was in Ms. Fowler's personnel file at the time the decision was made to discharge her. It is Ms. Fowler's undisputed evidence that she had not been confronted with this notice prior to October 7th. Mr. Weston had told the drivers that he would obtain the names of all persons registering complaints against them. However, in this case the person complaining would not give her name and Mr. Weston admitted that he had no way of knowing if the allegations against Ms. Fowler were true. The company's school bus drivers' manual, under the heading "Employee Discipline" — "Written Warning" provides that at this stage the employee is called to the manager's office to discuss the problem and that the results of the conversation are recorded in writing and signed by the employee. No such meeting took place in respect of the warning notice dated September 30th which was placed in the personnel file of Ms. Fowler.

11. Ms. J. Hill, a school bus driver working out of the company's Mississauga location, testified in respect of a conversation which she had with Mr. Weston on October 7, 1981. She testified that after having been told by another driver that she was underpaid for the amount of work she was doing, she asked to see Mr. Weston, the route supervisor, in his office. It is her evidence that she told him she was being "shafted" in her wages and demanded an increase. She testified that Mr. Weston broke down the costs associated with her run (gas, insurance, bus etc.) and concluded that it was a \$40 run. It is her evidence that during the course of their conversation Mr. Weston said to her "Jenifer there are a lot of troublemakers who want a union and we are whittling them out one by one — we know who they are." Ms. Hill was unshaken in cross-examination. Mr. Weston, who testified before Ms. Hill, had been asked in cross-examination if he had had a conversation in his office with Jenifer Hill on October 7th. Mr. Weston replied that Ms. Hill had been in his office on numerous occasions. He then denied that she had come to his office that day to discuss pay. When asked if Ms. Hill had been in his office on October 6, 7 or 8, he replied that he could not recall. He denied that he had referred to certain employees as "shit disturbers" or had talked of "weeding out" employees. Mr. Weston remembered, however, that on October 7th he said to someone over the telephone in a context unrelated to unionization, that there are a lot of people who like to make trouble.

12. The respondent company asks the Board to find that it discharged Ms. Fowler because of her driving record and for no other reason. The company maintains that where it is responsible for the transportation of school children and senior citizens it is reasonable to formulate a policy which may result in the discharge of an employee who has had two preventable accidents and which results in the discharge of an employee who has had three preventable accidents. The company asks the Board to find that Ms. Fowler, who had failed her driving test on three occasions, had had three preventable accidents in the first six months of her employment and therefore, became subject to its preventable accident policy. Where the evidence of Mr. Weston conflicts with that of the union witness, the company asks the Board to rely upon his evidence. The company suggests that Ms. Fowler volunteered to Mr. Weston that she was a union supporter in an effort to dissuade the company from applying its policy with respect to preventable accidents. The company reminded the Board that the fairness of its action in respect of Ms. Fowler is not at issue but rather, the motive. In the absence of any evidence to support the finding that the company was aware of Ms. Fowler's trade union

activity, and in the face of her driving record and the company policy with respect to preventable accidents, the company asks the Board to conclude that the decision to terminate Ms. Fowler was based solely on her driving record.

13. The union argues that on the evidence it must be found that the decision to categorize Ms. Fowler's June accidents as preventable was made in October. The union asks the Board to review the circumstances of each accident and ask itself if it is reasonable to conclude that each was preventable. The union argues that the characterization as preventable is not reasonable. In the face of evidence which establishes that the first two accidents took place one week apart, the union asks the Board to conclude that the June 26th follow-up report in respect of the second accident which shows that the driver had not been involved in any previous accidents, must have been made up at a later date. If Ms. Fowler's accidents had been classified as preventable at the time they occurred, then the company was confronted with an employee who had two preventable accidents in the first two months of her employment and had failed her driving test three times before commencing her employment. In these circumstances the union asks why she was not discharged at that time under a policy which permits discharge after two preventable accidents. The union asks the Board to find that Ms. Fowler was never told that her previous accidents were preventable because they were not considered as such by the company at the time. In the face of Mr. Weston's reference to the Teamsters unsuccessful organizing campaign at Wilson's Transport in his October 7th conversation with Ms. Fowler and the anti-union remarks he made to Ms. Hill the same day and the company's knowledge of trade union organizing from mid-September, the union asks the Board to conclude that Ms. Fowler was discharged for her union activities.

14. Section 89(5) of the Act stipulates:

"On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization."

15. The Board reviewed the general principles which govern in a case where the reverse onus established under section 89(5) applies in the recently reported *Alpha Laboratories Inc.* case [1981] OLRB Rep. July 823. The Board reviewed these principles at para. 3 as follows:

"In the *Barrie Examiner* case, [1975] OLRB Rep. Oct. 745, the Board stated:

'... the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts. First, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.'

It is not the function of the Board in the present case to decide whether or

not the respondent had just cause to discharge the grievors. Our jurisdiction is limited to determining whether the respondent discharged the grievors because they were supporters of the complainant trade union or were exercising any other rights under the Act (see *Toronto Star Limited*, [1971] OLRB Rep. Sept. 582, paragraph 11). This does not, however, preclude the Board from considering the context surrounding the respondent's actions, as indicated by the Board in *Fielding Lumber Company* [1975] OLRB Rep. Sept. 665, at paragraph 19:

'The Ontario Labour Relations Board has no general mandate to impose its views of fairness on employers and employees. Its sole responsibility is to administer and enforce *The Labour Relations Act* — a piece of legislation that does not stipulate that an employee can be terminated from his employment only for just and reasonable cause. But having said this it must be observed that in assessing an employer's declared motivation due regard may be had to the peculiarities of the context surrounding an employer's actions. To the extent that peculiarities exist and cannot be reasonably explained an employer may fail, by a process of inferential reasoning, to satisfy the burden placed upon it.'

The nature of the determination to be made in cases such as the instant case and the factors to be considered by the Board in making such determinations are described as follows in *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299, at paragraph 5:

'In cases such as these the Board is very often required to render a determination based on inferential reasoning. An employer does not normally incriminate himself and yet the real reason or reasons for the employer's actions lie within his knowledge. The Board, therefore, in assessing the employer's explanation must look to all of the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer's knowledge of it, unusual or a typical conduct by the employer following upon his knowledge of trade union activity, previous anti union conduct and any other 'peculiarities'. (See *National Automatic Vending Co. Ltd.* 63 CLLC 16,278). ...'

With those general principles in mind, the Board must now consider the facts of the present case."

16. The company, as a transporter of school children and senior citizens, has a vital interest in promoting and maintaining safety in the operation of its buses. Its policy of categorizing accidents as either preventable or non-preventable, and responding to two preventable accidents with possible discharge and to three preventable accidents with immediate discharge evidences the company's concern in this regard. However, notwithstanding the *bona fides* of the company's preventable accident policy and the number of accidents in which Ms. Fowler was involved, we must determine on the evidence if Ms. Fowler was discharged under the policy or whether it was used as a pretext, either in whole or in part, to discharge her for union activities.

17. We have not been satisfied in this matter that the decision to terminate Ms. Donna Fowler was devoid anti-union motive. The reason given for her discharge was the application of the company's longstanding preventable accident policy. On a careful review of the evidence we have concluded that her first two accidents were not considered by the company to be preventable accidents at the time they occurred. We accept Ms. Fowler's uncontradicted evidence that notwithstanding the July 18th date on the accident report, the first accident in which she was involved occurred on June 18, 1981. This was the accident on Islington Avenue which resulted in a charge being laid against the driver of another Charterways bus. Mr. Weston informed Ms. Fowler at the time that the accident was non-preventable and we are satisfied on the evidence that she was never told otherwise. The manager's follow-up report in respect of the June 26th accident on Flemington Ave. makes no reference to a previous preventable accident as one would have expected if the accident which occurred only one week before had been categorized by the company as preventable. Ms. Fowler was told by Ms. Linda Mathews not to worry about the second accident and Mr. Weston could not recall if he had told Ms. Fowler that it was preventable. Ms. Fowler testified that she was never told that the June 26th accident was preventable and we accept her evidence in this regard. Surely if the company had considered these accidents preventable Ms. Fowler would have at least been informed. We find support for our conclusion that the company did not consider these to be preventable accidents in the lack of a company response. If a company vitally concerned with safety and operating under a policy of possible discharge after two preventable accidents was of the view that a short-service employee who had failed her driving test on three occasions had had two preventable accidents in the first two months of her employment, why did it not respond in any meaningful way? The logical answer, and the answer consistent with the evidence, is that at the time the company did not consider these accidents to be preventable.

18. Why then in October did the company categorize as preventable the two accidents which Ms. Fowler had in June? In the normal course an accident is categorized at the time and not 10 — 12 weeks after the fact. The company was aware of the union organizing campaign from mid-September and the evidence discloses that Ms. Fowler was an employee active in the campaign. Ms. Jenifer Hill gave evidence of a detailed discussion with Mr. Weston pertaining to her wages and the cost of operating her run. She testified that during the course of that conversation Mr. Weston told her that there are "trouble makers who wanted a union and we are whittling them out one by one." Mr. Weston could not recall the conversation and denied having made the anti-union remarks. Having assessed the witnesses as they gave their evidence and having weighed the evidence against what best accords with reason and the objective facts in this matter, we are satisfied that Ms. Hill met with Mr. Weston in his office. We are further satisfied that Mr. Weston, who referred to the Teamsters' unsuccessful organizing attempt at Wilson's Transport in his conversation with Ms. Fowler later the same day, made the anti-union remarks attributed to him by Ms. Hill. In these circumstances we do not accept that the company acted solely on Mr. Beggs' October 6th assessment of Ms. Fowler's driving record. On the evidence before us we are satisfied that the company, in deciding to terminate Ms. Fowler was motivated at least in part by anti-union considerations.

19. The September 30th discipline report filed by the company does not assist it. Indeed, if the report has any probative value it is in support of the union's contention that a case was built against the grievor. In the face of Mr. Weston's assurance to the drivers that the name of anyone registering a complaint would be obtained, he completed a discipline report based on the complaint of an anonymous caller. In the face of a written policy which provides that at the written warning stage the employee discusses the matter with the manager and the

"nature of the problem and the results of the conversation are recorded in writing", Ms. Fowler was never told that this written warning was placed in her life.

20. Ms. Fowler was active in a union organizing campaign at the time she was discharged. The company was aware of the campaign and one of its officials admitted to a bargaining unit employee that the company knew who the union supporters were and intended to "whittle" them out one by one. Two of Ms. Fowler's three accidents, which the company categorized as preventable on October 7th, were not categorized as preventable prior to that date. We do not accept that the company acted solely on Mr. Beggs' characterization of Ms. Fowler's accidents as preventable some 10 weeks after they occurred. The company's decision to rely on two previous accidents, which had not been classified as preventable when they occurred, must weigh heavily against it. When the company's decision in this regard is considered in light of the ongoing union organizing campaign, Ms. Fowler's involvement in it and Mr. Weston's admissions, we are satisfied that the company, in relying on its preventable accident policy, was motivated by anti-union considerations. Accordingly, we hereby find that its decision to terminate Ms. Donna Fowler violated section 66 of the Act.

21. The company is ordered to reinstate Ms. Fowler to her former employment and to compensate her for all her lost wages, including interest, during the period of her termination. The company is further ordered to post forthwith copies of the attached notice marked "Appendix" duly signed by the respondent's representative, in conspicuous places on its premises where it is likely to come to the attention of the employees, and keep the notices posted for sixty consecutive working days. Reasonable steps shall be taken by the respondent to insure that the said notices are not altered, defaced or covered by any other material.

DECISION OF BOARD MEMBER W. H. WIGHTMAN;

1. From the evidence I believe that up to and including this incident the role played by Evan Weston, the Route Supervisor, in his handling of company policy with respect to accidents, was such that the discharge of Ms. Fowler on the basis of her accident record would not likely be sustainable before an arbitrator. Of course we are not constituted as a Board of Arbitration insofar as this aspect of the case is concerned.

2. I draw attention to the role of Weston because I firmly believe that Weston's handling of his responsibilities and his attitude with respect to the complainant are to be differentiated and are distinguishable from the corporate attitude exemplified by Beggs and Hoornweg, the two officials of the company who took the decision to discharge Ms. Fowler.

3. As mentioned above, the information upon which Beggs and Hoornweg took their decision may have been faulty in that it consisted largely of Weston's reports. While relying on Weston's information could have proven fatal before an arbitrator charged with making a finding under the terms of a collective agreement, I believe they were entitled to rely on it at face value for the purposes of the decision they took and that they did so without regard for whatever roles Ms. Fowler played, or told Weston she had played, in union organizing. Indeed, I saw no proof they were even aware of her union activities.

The Labour Relations Act

NOTICE TO EMPLOYEES**Posted by Order of the Ontario Labour Relations Board**

We have posted this notice in compliance with an Order of The Ontario Labour Relations Board issued after a hearing in which we and the union participated. The Ontario Labour Relations Board found that we violated the Labour Relations Act by discharging Donna Fowler.

The Act gives all employees these rights:

To organize themselves;

To form, join and participate in the lawful activities of a trade union;

To act together for collective bargaining;

To refuse to do any and all of these things.

We assure all of our Employees that:

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT discharge any employee because he has selected the Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillers Workers as his exclusive bargaining agent;

WE WILL offer to reinstate Donna Fowler;

WE WILL pay Donna Fowler for any earnings that she lost as a result of her discharge, plus interest.

CHARTERWAYS TRANSPORTATION LTD.
PER: (AUTHORIZED REPRESENTATIVE)

DATED: JANUARY 12, 1982

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

0441-81-R; 0580-81-R Operative Plasterers' and Cement Masons' International Association, Local 172, Applicant, v. **Clifford Masonry Limited**, Respondent, v. Labourers' International Union of North America, Local 506, Intervener; The Labourers' International Union of North America, Local 506, Applicant, v. Clifford Masonry and Building Restoratin Ltd., Respondent.

Certification – Reconsideration – Reconsideration application claiming jurisdictional error of law or breach of natural justice by Board – Questioning Board's practice of postponing hearing of subsequent certification application – Whether Board ignored Divisional Court decisions in *Fisher* and *Baltimore Aircoil* cases – Board finding no grounds to reconsider decision

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members J. Wilson and H. Kobryn.

DECISION OF THE BOARD; January 19, 1982

1. Labourers' International Union of North America, Local 506 ("Local 506") which was an intervener in Board File #0441-81-R and the applicant in Board File #0580-81-R, has asked the Board to reconsider its decisions in these two cases, both of which were applications for certification. These decisions issued November 4, 1981 and November 13, 1981, respectively. Local 506's application for reconsideration was made by letter dated November 24, 1981 and copies of it were sent by the Registrar to the other parties for comment. Formal responses have now been received from Clifford Masonry Limited ("the employer"), the respondent in each application, and from the solicitors for the Operative Plasterers' and Cement Masons' International Association, Local 172 ("Local 172"), which was the applicant in Board File #0441-81-R.

2. The basis put forward by Local 506 for the request for reconsideration is summarized in the following statement contained in the November 24th letter from its solicitors: "... It is our position that the Board has committed a jurisdictional error, erred in law or committed a denial of natural justice by its two decisions". The Board's authority to reconsider its decisions is contained in section 106(1) of the *Labour Relations Act* which is set out below and the exercise of that authority is in the Board's discretion.

106(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

3. The substantial elements of Local 506's request for consideration are as set out in the November 24th letter in the following terms:

"The factual basis for this application is as follows:

1. On or about May 28th, the Operative Plasterers' filed an application

for certification. In that application there was no mention that Labourers' Local 506 might be a bargaining agent of employees who were affected by the application;

2. On or about May 29th, 1981, Labourers; Local 506 filed an application for certification (see Board File 0459-81-R) which sought to represent the same employees in the application brought by the Operative Plasterers'. For reasons which were briefly touched upon at the hearing into the applications by this Board, that application for certification was withdraw [sic] by leave of the Board.
3. On or about June 5th, 1981, Clifford Masonry Limited, which had been incorrectly described as Clifford Masonry and Building Restoration Limited in its application for certification, filed a reply to the certification to the effect that the bargaining unit described by the Applicant was already covered by a Collective Agreement with Labourers' Local 506;
4. On or about June 11th, 1981 Labourers' Local 506 filed an intervention in the Operative Plasterers' application for certification and advised the Board that it intended to file under separate cover its own application for certification for the same employees sought to be represented by the Operative Plasterers';
5. On or about June 15th, 1981 Labourers' Local 506 filed an application for certification and submitted the appropriate Form 54 along with its signed applications for membership cards. At that time Labourers' Local 506 requested that its application be consolidated with the Operative Plasterers' application and also advised the Board that a Collective Agreement bar existed to the application brought by the Operative Plasterers'.

At the hearing before the Board on the Applicant's (Operative Plasterers') application, the Intervener took the position that the employees who were the subject matter of the applications be permitted to determine by vote which bargaining agent they wished to represent them. It was the position of Labourers' Local 506 that in light of the competing claims of two unions, neither application having been determined, this was the fairest determination to which the Board could come. It must be noted that Section 103(3) of the *Labour Relations Act* (formerly Section 92(3)) does not preclude this determination. In fact, the Board had the discretion to treat the subsequent application brought by Labourers' Local 506 as having been made on the date on which the original application by the Operative Plasterers' was made. It is only Board practice which generally postpones consideration of a subsequent application until the final decision has been made with respect to an earlier application for certification.

In light of the fact that there was no reference in the application for

certification by the Operative Plasterers' to any other bargaining agent which might be affected, it is difficult to ascertain how Labourers' Local 506 could be expected to file its application no later than the terminal date in the application for certification brought by the Operative Plasterers'. In any event, the application for certification brought by Labourers' 506 coupled with its intervention in the Operative Plasterers' application was clearly brought before the time that the Operative Plasterers' application was heard by the Board. Thus, the Operative Plasterers' application could not be said to have been prejudiced by the subsequent application for certification by Labourers' Local 506.

Rule 57(2) of the Board's Rules provides for the enlarging of time presumably where the Board feels that such enlargement is advisable or necessary in the interest of justice. In this case, the employees who signed cards favouring Labourers' Local 506 as the bargaining agent they wished to have represent them are prejudicially affected by the Board's reliance on its traditional practice. It is respectfully submitted that the interests of the Board demand that employees be permitted a right of free expression as to which bargaining agent they prefer.

Further, the failure to order a vote in the circumstances of this case is analogous to a failure by the Board to hear objections made by objectors to an application for certification. In this respect, therefore, the Board's decisions could be said to have been made without jurisdiction. When the choice is between two competing unions, it seems more appropriate that the employees themselves be given the opportunity to be heard. To do otherwise, if it could not be said to be a jurisdictional error, might be considered a denial of natural justice. See, respectively, *Re Fisher et al and Hotels, Clubs, Restaurants, Tavern Employees Union Local 261 et al*, (1980) 28 O.R. (2d) 462 and *Re Baltimore [sic] Aircoil Inter-American Corporation and the Ontario Labour Relations Board and the United Steel Workers of America*, (unreported) S.C.O. July 7th, 1981 (Divisional Court).

These cases made it abundantly clear that the Court has directed the Board to be vigilant about protecting the rights of employees who, in the circumstances of those cases, wished to object to an application for certification even though their petition was not received by the Board in the appropriate form before the terminal date of the application for certification in question. The Board has interpreted the *Re Fisher* decision to say that if an employee who signed an application for membership in a union wishes to revoke that commitment up to the date of the hearing, the Board is obliged to hear that evidence and to consider it. To do otherwise is a denial of natural justice.

In this case, the employees in the proposed bargaining unit who signed membership cards in favour of the Operative Plasterers' must also have signed membership cards with Labourers' Local 506 and paid the appropriate fee to join Labourers' Local 506. These actions must

demonstrate the employees' seriousness of purpose. This membership evidence with respect to the Labourers' application for certification was submitted *before* the hearing date of the application for certification filed by the Operative Plasterers'. Clearly the employees in question had demonstrated that they were equivocal [sic] about having the Operative Plasterers' as their exclusive bargaining agent. However, by its recent decisions, the Board did not even *consider* the membership evidence of the employees in the proposed bargaining unit as it related to the desire of these employees to have Labourers' Local 506 as their bargaining agent.

Respectfully, as Mr. Justice Reid has said in the *Re Fisher* decision (at page 468) the opportunity of parties to be heard "overrides the Board's power to determine its own practice and procedure." By routinely following its traditional practice to postpone the hearing of a subsequent application for certification, the Board has clearly denied certain employees their right to be heard as to which bargaining agent ought to represent them. It is for these reasons which compels Labourers' Local 506 to ask this Board to reconsider its earlier decisions, revoke the certificate granted to the Operative Plasterers' and place the issue before the employees concerned for a vote."

4. The employer agrees with the arguments advanced by Local 506.
5. The request for reconsideration elicited the following response from counsel for Local 172.

"It appears to us that Local 506 has based its Request for Review and Reconsideration upon the grounds that there was a denial of natural justice in the failure of the Board to exercise its discretion to treat both of the above Applications as having been made upon the same date, and in consequence to order a vote.

This issue was placed before the Board by Local 506 at the Hearing, and all parties were afforded full opportunity to make representations on that issue, and all other issues involved, and with respect to that issue, the Board's decision is contained in Paragraph 23.

In substance, the argument contained in the letter from Mr. Grant of November 24th, 1981, was that which was made before the Board at the Hearing.

Both parties (Local 506 and Local 172) adduced evidence before the Board and made representations to the Board, but no petition or desire to make representations was filed with the Board by any Employees in the Bargaining Unit, either prior to or subsequent to the terminal date. No employee in the Bargaining Unit attended at the Hearing, or requested to be heard. None of those employees were made parties at the Hearing. Despite this, it is suggested by Local 506 that there was a denial of natural justice in like manner to that found by the Courts in re: *Fisher et al.*

The case of re: *Fisher* is clear authority for the proposition that refusal of the Board to hear a party constitutes a denial of natural justice, and that the obligation to hear that party is paramount. However to equate that obligation with an obligation to treat an Application for Certification received subsequent to the terminal date of a prior Application as having been received on the date of that prior Application, is not justified. This is particularly so in the light of the specific discretion afforded to the Board by Section 103(3). In the light to [sic] Section 102(13) if a "party" to the proceedings were denied a hearing, in certain circumstances that would be a denial of natural justice. However Local 506 was afforded a full hearing in the proceedings which were then before the Board, and no party was denied a hearing.

If the subsequent Application of Local 506 with appropriate Membership Evidence had been filed prior to the terminal date of Local 172's Application apart from the practice of the Board to treat that Application as having been made on the date of the original Application, such an Application could be treated as a Statement of Desire as envisaged by Form 5 (Notice to Employees). Such, however, was not the case.

Withreference to the suggestion that Local 506 was not given notice of Local 172's Application, it was accepted by the Board that at the time of that Application, on May 28th, 1981, Local 172 was not aware that Local 506 claimed to represent the Employees in the Bargaining Unit. No notice of Local 172's Application was given to Local 506, however Local 506 did file an Application for Certification on May 29th, which Application was subsequently withdrawn. In that Application no reference was made to Local 172. Notwithstanding the failure of Local 506 to receive notice of the Application of Local 172, well prior to the terminal date of Local 172's Application those employees purported to be represented by Local 506 were made aware of Local 172's Application as a result of the Board's notices, and no doubt Local 506 was aware of that Application. Local 506 took no action because, we suggest, it was content to rely upon its own Application of May 29th, (subsequently withdrawn), as securing to it the right to a vote. It was only when it determined that its Application of May, 29th was defective, that Local 506 sought to correct this by Intervening in Local 172's Application, withdrawing its May 29th Application, and filing a new Application. Local 506 did not seek to extend the terminal date of Local 172's Application for we suggest, in the circumstances outlined above, no such extension would have been granted.

The Board's decision to postpone and eventually dismiss the Application of Local 506 in Board File No. 0580-81-R, was properly made in the exercise of its discretion under Section 103(3), and in no sense denied any party a fair Hearing as required by Section 102(13), and the request for reconsideration should be denied."

6. The Board also received the following comments from counsel for Local 506 made in the nature of a reply to the submissions of counsel for Local 172.

“It is our view that in light of the fact that Local 506 made a contemporaneous application with that of Local 172 of the Operative Plasterers albeit that the Local 506 application was withdrawn, no premium should be given to the ‘first’ application in time. To do otherwise by the Board essentially permits employees wishes to be defeated by technicalities.

Clearly the Board was aware that on these two separate occasions, employees who have now been placed in the bargaining unit proposed by the Operative Plasterers’ signed membership cards indicating a desire to be represented by Labourers’ Local 506. Indeed the application for certification brought by Local 506 was as an alternative only to the assertion that Local 506 already had bargaining rights for these very employees.

In these circumstances, while the Board may be entitled to find that any bargaining rights which Local 506 had held previously had been abandoned, the refusal of the Board to permit the employees to choose which bargaining [sic] agent they wish to have represent them must be said to be a decision whereby Board practice has superseded substance which, in our view, cannot be the intent of the provisions of the Labour Relations Act.”

7. The Board in its November 5th decision with respect to Board File #0441-81-R, found that Local 506 did not have bargaining rights pursuant to the current labourers provincial agreement for any of the employees coming within the bargaining unit sought by Local 172 and that the provincial agreement, therefore, was not a bar to Local 172’s application for certification. The Board then considered, in paragraph 23 of the decision, the request of Local 506 to exercise the Board’s discretion pursuant to section 102(3) of the Act so as to treat Local 506’s application as though it had been made on the same date as that of Local 172. The Board declined to do so. Had it acceded to the request, and if Local 506 had the requisite membership support, a representation vote would have been directed in order to determine whether the employees wished either of the two applicants to represent them. Having declined the request, the Board ultimately certified Local 172. That certificate became a bar to the application for Local 506 in Board File #5080-81-R and the Board terminated those proceedings. Local 506 now seeks to have the Board reconsider both of those decisions, revoke the certificate and exercise its discretion under section 103(3) in the manner which Local 506 had originally requested so that the employees could determine by means of a representation vote whether they wished either Local 172 or Local 506 to represent them in their relationships with the employer.

8. The Board is cautious in the exercise of its discretion under section 106(1) to reconsider and vary or revoke any decision so as not to undermine the finality of its decisions. The Board’s usual grounds for reconsidering its decisions are set out in the following terms in *Canadian Union of General Employees*, [1975] OLRB Rep. April 320:

“Generally, the Board will not reconsider a decision unless a party proposes to adduce new evidence which could not previously have been obtained by reasonable diligence and the new evidence is such that, if adduced, it would be practically conclusive or a party wishes to make

representations or objections not already considered by the Board that he had no opportunity to raise previously.”

• • •

As the Board observed, however, in *John Entwistle Construction Ltd.*, [1979] OLRB Rep. Nov. 1096,

“... These are general standards which the Board has developed as guidelines and which are useful not just to guide the Board in making its decision, but also to allow parties who may be affected by the Board’s decisions some degree of certainty of what to expect from the Board. While it is important for the purpose of certainty that these standards generally be adhered to, it is equally important that they not be followed inflexibly.”

• • •

The Board in that case was faced, *inter alia*, with the challenge that there was no statutory foundation for the Board’s policy of abandonment of bargaining rights on which the Board had relied to terminate the bargaining rights of the trade union applicant. The Board went on to state

“... Although neither of the two conditions precedent stated in the *Canadian Union of General Employees* case, *supra*, are satisfied here, the request does raise significant and important issues of Board policy and for this reason the Board will review its decision to determine if it should vary or revoke the decision.”

(emphasis added)

The request in the case at hand raises a question of the manner in which the Board has followed its customary practice with respect to its discretion under section 103(3). Counsel for Local 506 contends that “By routinely following its traditional practice to postpone the hearing of a subsequent application for certification, the Board has clearly denied certain employees their right to be heard as to which bargaining agent ought to represent them.” Local 506 does not claim there is no statutory authority for the Board’s “traditional practice” and in the Board’s view does not raise as important an issue as was raised in *John Entwistle*, *supra*. But this claim is coupled with the claim that the Board has acted in a manner contrary to the instructions of the court in *Re Fisher et al and Hotels, Clubs, Restaurants and Tavern Employees Local 261 et al*, (1980) 28 O.R. (2d) 462 and *Re Baltimore Aircoil Inter American Corporation and the Ontario Labour Relations Board and the United Steel Workers of America*, 81 CLLC ¶ 14,130 (Div. Ct.). Together these constitute sufficient reason for the Board to review its decision to determine whether it should vary or revoke them.

9. The factual basis set out in the request for reconsideration is generally accurate, except in one minor respect in item #5, but is incomplete. The additional facts and the correction are set out below by reference to the same item numbering as followed in the request.

1. The Board’s record in Board File #0441-81-R, the application for

certification of Local 172, shows that the terminal date set for the application was June 8th, 1981 and that the Board's notice of the application to the employees was posted by the employer on June 2nd, 1981.

2. The Board's record in Board File #0459-81-R, the first application for certification filed by Local 506, indicates that the terminal date for it was June 9, 1981; the Board's notice of the application to the employees was posted by the employer on June 5th; the application named as the respondent Clifford Masonry and Building Restoration Limited; the application contained no mention of Local 172 as a trade union known to Local 506 as claiming to represent any of the employees who may be affected by the application, to paraphrase paragraph 9 of the application form; Local 506 advised the Board by telex dated June 10, 1981 that it intended to withdraw the application; on June 12, 1981 the Board issued a decision dated June 11, 1981 consenting to the withdrawal. The Board's record of the hearing into Board File #0441-81-R reveals that the reason why Local 506 withdrew this application was its failure to file by the terminal date, as required by the Board's Rules of Procedure, its membership evidence and the statutory declaration concerning membership documents.
3. The intervention in Board File #0441-81-R filed by Local 506 also served notice on the Board that it would be asking the Board to consolidate its forthcoming application with that of Local 172 (see paragraph 7, clause (a) of the Board's decision). The intervention did not raise the collective agreement bar.
4. The Board's records in Board Files #0441-81-OR and 0540-81-R also reveal that Local 506 did *not* raise the collective agreement bar to the application of Local 172 at the time Local 506 filed its second application for certification. The first reference by Local 506 to a collective agreement bar was contained in a letter from its counsel to the Registrar dated June 18, 1981. Counsel acknowledges in that letter receipt of a letter from the Registrar dated June 16, 1981 in which the Registrar had advised that Local 506's second application for certification would not be processed until the Board had disposed of Local 172's application. By that same letter, counsel put the Board on notice that it would be seeking to have the Board consider its application as though it had been made on the date of Local 172's application and that, since the Board had not made a final decision on that application, if it certified Local 172, the Board might do a grave injustice to the wishes of the employer's employees.

10. Counsel for Local 506 is correct, of course, in asserting that section 57(2) of the Board's Rules of Procedure provide the Board with the discretion to enlarge the time limits for the filing of documents or for the doing of any acts prescribed by the Rules. The Board is exercising this discretion, for example, when it extends the terminal date in an application for

certification because an employer's failure to post the Board's notice to employees has deprived employees of proper notice and thus of the opportunity to intervene in the application. In the case at hand, no request was made by any employee or by Local 506 to extend the terminal date in Local 172's application. As the response from counsel for Local 172 notes, Local 506 did not request at the hearing that the Board extend the terminal date. Nor did Local 506 request an extension of that date when it supported the request for a hearing made in its intervention on the ground that it would be filing a separate application for certification and asking that it be consolidated with that of Local 172. Nonetheless, the question of extending the terminal date of Local 172's application, in spite of there having been no request, was an implicit factor in the Board's consideration and refusal of Local 506's request to treat its application, pursuant to section 103(3) of the Act, as having been made on the same date as that of Local 172. The terminal date of an application for certification is the time determined by the Board under section 103(2)(j) of the Act for the presentation of evidence of membership in a trade union or of objection of employees to certification of a trade union. In this respect see also section 48(1) of the Board's Rules of Procedure which states, in part, that "Evidence of membership in a trade union or of objection to certification of a trade union . . . shall not be accepted by the Board on an application for certification unless the evidence . . . *is filed not later than the terminal date* for the application." (emphasis added). Thus if a trade union fails to file its evidence of membership support by that date, it fails to establish that, as of the date, it had the requisite membership support to be entitled to either certification or a representation vote and the application would be dismissed. By treating Local 506's application as though it had been made on May 28th, 1981, the date when Local 172 filed its application, the terminal date which had been set for that application, June 8th, 1981, would apply as well to Local 506. Therefore, in order to accede to Local 506's request, it would have been necessary for the Board to extend the terminal date which had been set for Local 172's application to a date late enough to accomodate the June 15, 1981 filing date of Local 506's application and in accordance with section 65 of the construction industry part of the Rules of Procedure. In a like manner, new notices to the parties and the employees affected by the application would have to be served in accordance with section 67(2) of the Rules, thus contributing to delay in processing the first application. Where an application for certification has been made by one trade union and another seeks to be certified for employees who may be affected by the application, section 72(1) of the Rules attempts to avoid these complications by providing that:

72.-(1) A trade union or council of trade unions desiring certification as bargaining agent of employees who may be affected by the application shall file an intervener's application for certification in quadruplicate in Form 58 *not later than the terminal date for the application* and the intervener's application shall be accompanied by a declaration concerning membership documents in Form 54.

(2) Section 65 does not apply to an intervener's application.

(3) Where the Board so directs, the registrar shall serve the employer with notices of the intervener's application for posting.

(emphasis added)

11. The comments of Local 506's counsel in the first quoted paragraph in paragraph 6

above suggest that the Board is giving “premium”, his word, to the application of Local 172 because its application was first. Further, by doing so, the Board is permitting “. . . employee’s wishes to be defeated by technicalities.”. That statement ignores the plain fact that Local 506 failed in both applications to file its membership evidence by the applicable terminal date (see paragraph 10 above). The Board has said many times that the late filing of membership evidence is not a mere technicality, rather it is a matter of substance. For example, the Board’s decision in *Addressograph-Multigraph of Canada Limited*, [1968] OLRB Rep. Mar. 1183, at paragraph 15 comments as follows:

“... the late filing of the membership evidence is not a mere defect in form or technical irregularity but is a matter of substance. The terminal date is also the membership date for determining the union’s membership position and the Board has consistently required strict compliance with the requirements of section 48 of the Rules since the whole application turns on the terminal date and what flows from it.”.

12. Except for its argument that employees who signed membership cards with Local 172 must also have signed cards with Local 506 and should have been treated by the Board in a manner analagous to employees who object to certification of a trade union, an argument dealt with later in the decision, the only argument advanced in the hearing by Local 506 in support of its request to consolidate the two applications was to the effect that it could not reasonably have been expected to file its application before the terminal date of Local 172’s earlier application because Local 172 failed to name it as a bargaining agent. This argument is repeated in the request for reconsideration in the second paragraph following item 5 of the “factual basis” for the request quoted above at paragraph 3. This argument was considered by the Board and in its view lacked any merit. There was no evidence before the Board that Local 172 knew or should have known that Local 506 was or claimed to be bargaining agent for the employees whom Local 172 was seeking to represent. That likelihood first arose when the employer filed its reply and raised the labourers provincial agreement as a bar. Even Local 506 did not raise this bar until three days after it had filed its own application and a week after filing its intervention in Local 172’s application. The fact that the two unions appear to have been conducting overlapping campaigns and both unions should have been aware, if they were at all diligent, of the other’s presence does not impose any obligation on either union to reveal a potential interest of its opponent. Even were there an obligation, Local 506’s conduct was no better than that of Local 172 in this respect since, when it filed its first application the day after Local 172’s application was filed, it failed to reveal Local 172’s potential interest. Finally, in spite of the fact that Local 506 was not a party entitled to specific notice of the application, it should have been aware of the application and, if it was not, it was through its own lack of diligence. Local 506 had conducted its own campaign amongst the employees. The Board’s notice to the employees of Local 172’s application was posted on the job sites on June 2nd, 1981. The notice to employees of Local 506’s first application was posted June 5th, 1981. If, as Local 506 claimed, it had support amongst the employees it had the ready opportunity to know of the application and, if it did not know, that would be by its own failure.

13. These facts were before the Board or were a matter of Board record at the time the Board reserved its decision in the hearing on the request of Local 506 to join its application with that of Local 172. Alone they provide sufficient grounds for the Board to find, as it did in paragraph 23 of its decision, that there was no reason to depart from its customary practice of postponing consideration of a subsequent application, when it has been made later than the

terminal date set for an earlier application, until the Board has disposed of the earlier one. When the Board made that decision it had the additional facts which were revealed by the evidence related to the collective agreement bar. Those facts showed that neither the employer nor Local 506 had conducted themselves as though Local 506 was bargaining agent of the employees affected by the application. In such circumstances it can hardly be held against Local 172 that it did not identify in its application Local 506 as claiming to be bargaining agent of employees affected by the application. These facts also showed that, at all material times, two employees on the principal job site affected by the application were long-standing employees and members of Local 506. Therefore, Local 506 had a presence on the job additional to the new employees whose support it was claiming and through which it had the opportunity to know of Local 172's activities and its ultimate application. In all of these circumstances the Board found no reason to except Local 506 from the Board's customary practice when exercising its discretion under section 103(2) of the Act.

14. For an example of some of the matters which concern the Board when it is considering whether to extend the terminal date in conjunction with a subsequent application filed after the terminal date of an earlier one, see the Board's decision in *Addressograph-Multigraph, supra*, paragraphs 15 through 21.

15. The Board turns now to the argument that the Board's failure to order a representation vote, for the purpose of allowing the employees to decide which union they wished to represent them, was analogous to a failure by the Board to hear objections made by objectors to an application for certification and thus could be said to have been made without jurisdiction, or if not a jurisdictional error, a denial of natural justice.

16. Counsel for Local 506 relies, in support of this argument, on two Divisional Court decisions: *Re Fisher et al and Hotels, Clubs, Restaurants, Tavern Employees Union Local 261 et al*, (1980) 28 O.R. (2d) 462 and *Re Baltimore Aircoil InterAmerican Corporation and the Ontario Labour Relations Board and the United Steel Workers of America*, (unreported) S.C.O. July 7th, 1981 (Divisional Court). Counsel contends that that "These cases make it abundantly clear that the Court has directed the Board to be vigilant about protecting the rights of employees who, in the circumstances of those cases, wished to object to an application for certification even though their petition was not received by the Board in the appropriate form before the terminal date of the application for certification in question.". Neither of these cases stand for the proposition that the Board must entertain objections from employees that are made after the terminal date of an application for certification. In each case the Board was dealing with a timely statement of objection to the application. In each case the objectors were present at the hearing and, for different reasons in each case, the Board refused to hear from them even though they had filed timely objections. There is nothing in the judgement in either case which suggests that the Board must consider statements of objections which are not filed in accordance with the time limits set by section 48(1) of the Rules of Procedure. Neither case involves a failure to meet that time limit.

17. In the instant case, as the response from counsel for Local 172 to the request for consideration points out, no employee had filed any statement in opposition to the application or any statement of desire to make representations at the hearing, nor did any employee attend the hearing seeking to be made a party to it. Clearly, then, there was no refusal to hear any employee. Local 506 was at the hearing and claimed to represent employees who had signed cards with it. Counsel for Local 506 was afforded a full hearing on its request to

treat its application as having been made on the same date as Local 172's, including counsel's contention that the membership evidence filed in support of the Local 506 application was analogous to objections by those employees to being represented by Local 172. So there was no refusal to hear these representations by Local 506 made on behalf of employees who signed cards with it and therefore no denial of natural justice. Moreover, while it is not explicitly referred to in paragraph 23 of the Board's decision, this argument was considered and rejected by the Board when it concluded that there were no grounds for it not to follow its customary practice in exercising its discretion under section 103(3) of the Act. Even if the Board were to agree with counsel's analogy, clause (b) of section 48(1) of the Rules of Procedure would preclude the Board from entertaining the Local 506 membership evidence as opposition to Local 172's application. This would apply to its first application as well because it had filed no membership evidence by the terminal date.

18. As the Board noted in paragraph 8 above, counsel for Local 506 also contends that "... By routinely following its traditional practice to postpone the hearing of a subsequent application for certification, the Board has clearly denied certain employees their right to be heard as to which bargaining agent ought to represent them.". The Board disagrees with this contention on two grounds. First, the Board has not, as counsel contends, routinely followed its traditional practice. The Board's decision and its record of the proceedings show that it has acted in this case only after due consideration of all of the representations of the parties and then in accordance with its well known policy. Second, the Board has not denied any employees the right to be heard and in fact heard the representations of Local 506 which purports to have acted for certain employees. If counsel means that, by not joining the two applications so that a representation vote would have been directed if the requisite membership support was present, the Board has denied these employees "... *their right to be heard* [by means of a representation vote] as to which bargaining agent ought to represent them." (emphasis added), this would be as a consequence of the operation of section 48(1) of the Rules of Procedure and not by a jurisdiction error of the Board.

19. In conclusion, the Board's decision of November 5th, 1981 and its record of the hearing into this application for certification reveal that all parties had the opportunity to make and have considered by the Board their full representations on all issues and their representations were duly considered by the Board. Nor has the Board refused to hear employees who were present at the hearing (there were none) and who had duly filed an objection to an application, or refused to consider a duly filed objection. Therefore the Board is firmly of the view that it has not committed a jurisdictional error and has not acted contrary to the instructions of the courts. Thus there are no exceptional grounds which would cause the Board to exercise its discretion under section 106(1) of the Act to amend, vary or revoke its decisions in this matter. Accordingly, absent as well the usual grounds for exercising that discretion, the Board does not deem it advisable to amend, vary or revoke its decision.

1873-81-R United Food and Commercial Workers International Union, Local 1000A, Applicant, v. Consumers Distributing Company Limited, Respondent, v. Group of Employees, Objectors

Bargaining Unit – Certification – Petition – Board refusing to sever seasonal employees from part-time and student unit – Whether management meetings with employees casting doubt on voluntariness of petition – Effect of absence of evidence with respect to prior petition on voluntariness of subsequent petition – Board finding petition voluntary

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members F. W. Murray and M. J. Fenwick.

APPEARANCES: *Paul J. J. Cavalluzzo, D. Gilbert and E. Andruszczyszyn for the applicant; Barbara G. Crosby, Louis Maalouf, Donald R. Helman and Glain Webber for the respondent; Wanda M. Hood for the objectors.*

DECISION OF THE BOARD; January 19, 1982

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. The application covers two or three full-time employees and 17 part-time employees at the respondent's store in Belleville. It was agreed that a separate bargaining unit for each of these two groups was appropriate. The respondent argued that a third bargaining unit would be appropriate as well, composed of the employees it hires on a fixed-term contract basis to cover the Christmas peak, commencing in late October and building towards the end of December. The Board ruled, however, that the characteristics and interests of these so-called "seasonal" employees were not sufficiently distinct from those of the part-time and student bargaining unit to justify a separation from that unit. The Board did indicate, on the agreement of the parties, that these "seasonal" employees would properly form part of the part-time, and not the full-time, bargaining unit, irrespective of the number of hours worked per week.
4. A further dispute existed between the parties over the exclusion of the Assistant Store Manager, on the basis of her managerial responsibilities. The Board accordingly appointed an officer to inquire into and report to the Board on her duties and responsibilities.
5. The applicant filed with this application 12 combination applications for membership and receipts, which placed the applicant in a position where it could be certified by the Board for both units without the taking of a representation vote. There was, however, a timely statement in opposition filed by employees in this matter, containing the signatures of 17 employees, including 10 of the 12 individuals who had signed applications for membership. The distribution of these "petition" overlap was such that, if found to be voluntary, the Board would normally direct the taking of a vote with respect to both units. The Board accordingly conducted its usual inquiry into the origination and circulation of the petition.
6. The evidence on behalf of the objecting employees was given by Mrs. Wanda Hood.

Mrs. Hood has been employed as a sales clerk with the company off and on since 1976, and is presently one of the two full-time employees in the store, apart from the Assistant Store Manager whose status is in dispute. As noted, the petition appears to indicate that the applicant has now lost the support of virtually the entire bargaining unit. Mr. Cavalluzzo, counsel for the applicant, asked Mrs. Hood for her explanation of this sudden turnabout. Mrs. Hood responded that the employees had not really had an opportunity to talk together before signing the union's membership cards, and that a number of them were confused as to what it meant. Mrs. Hood herself says that she signed the card at her home under pressure from her husband and the two employees from the store who attended with the union organizer. Mrs. Hood readily acknowledged, however, that the organizer made no promises or misrepresentations. Mrs. Hood testified that after the employees had signed, she and a number of the other employees began talking amongst themselves as to what it meant, and why they had done it, and began to change their minds. She testified further that they had no idea what they could do about it before they saw the green sheet posted by the Labour Board, and so she and a couple of other employees wrote letters to the union asking to withdraw their cards. She explained that as additional employees became involved in the discussions, one of the other employees, not present at the hearing, decided to circulate a letter to the union in which any employee who wanted to could sign. This was still prior to the posting of the "green sheet" from the Board, and the letter to the union read:

"Dear Sirs:

We, the staff at Consumers Distributing Ltd. in Belleville have decided amongst ourselves that we would like to discontinue our application to form a union. It would be greatly appreciated if no future pressure was exerted by your union representative [sic].

Sincerely,"

This letter was signed by a number of employees in the bargaining unit.

7. Early in December, the notice to employees (green sheet) from the Labour Board was posted on the store bulletin boards. Mrs. Hood testified that she and another employee went over the green sheet carefully, and from it were able to figure out what employees could do if they were opposed to the application. She then drafted a handwritten petition to the Board which read:

"Dear Sirs,

This is to advise you that we, the employees of Consumers Distributing Company Limited, Belleville, wish to petition that the bargaining unit, United Food and Commercial Workers International [sic] Union Local 1000A, not be certified. Thank you."

Behind the store's showroom, which houses the sales desk at which Mrs. Hood works, the respondent has a large warehousing area, and at the back of this area is a counter which the employees use for their lunch and breaks. Mrs. Hood drafted her petition at this lunch-counter. She then kept the petition in her purse or smock-pocket, and offered the petition to employees to sign whenever she had the opportunity. All of the signatures on the petition were gathered by Mrs. Hood on the respondent's premises. Some were collected at the lunch break

or change of shift, but Mrs. Hood candidly acknowledged that on a number of other occasions, either she or the employee signing the petition were on their work time. These latter encounters took place in the warehouse area, to which Mrs. Hood has regular access for the purpose of following up customer complaints. Mrs. Hood testified that, with very few exceptions, the employees that she approached had been part of the earlier discussions to withdraw from the union, and she therefore spent very little time with each one as the petition was signed. She testified that any of the managers could be present in the warehouse area at any given time, but that she took care to exhibit the petition only when they were not. She indicated that while management in all likelihood knew what was going on, Mrs. Hood, for her part, made every effort to circulate the petition "behind their backs". When asked by counsel for the applicant why she felt it necessary to do so, Mrs. Hood testified that she had been advised by her brother-in-law, a union steward, that it is best not to involve management in this type of matter, and that further, the employees felt that they had created the problem on their own, and that it was up to them to solve it in the same way.

8. Of further relevance to this matter is the occurrence of two management meetings with employees a few days prior to the posting of the Board's green sheet. The first involved the two full-time employees of the store, Mrs. Hood and another employee, and the internal management of the store, together with the respondent's District Manager. Mrs. Hood indicated to the Board that this type of meeting was a regular occurrence at the store, but she was somewhat surprised at the attendance of the District Manager. She testified, however, that she had only recently returned to employment with the respondent, and that the other employee advised her that the District Manager had attended such meetings before. These meetings are apparently designed to let management know what problems the two full-time employees are encountering in the operation of the store, since they are much closer to the work, as well as the performance of the part-time employees, than are the management personnel themselves. Mrs. Hood indicated in that regard that, while the part-time employees know that the full-time employees have these regular discussions with management, the full-time employees do not "scare" them the way that management does. Mrs. Hood testified that at this meeting subjects such as the annual Christmas party and the placement of ladders were discussed, but not the union. A couple of days later, a meeting took place between management and all the employees of the store in the respondent's showroom. The evidence establishes that such meetings are held each month at the store for the purpose of receiving input from the employees with respect to any complaints or suggestions they may have, and to provide an opportunity for management response. These meetings were begun in February of 1981 by the respondent, when it realized that owing to the scattered nature of its organization, all communication between upper management and the store personnel was flowing in one direction only. These meetings were an attempt to establish and maintain regular two-way communication instead. Mr. Maalouf, the Director of the respondent's store operations for Canada, conceded that this initiative on the part of the respondent in February coincided with certain organizing efforts at stores of the respondent elsewhere in the province, and he acknowledged that this organizing activity might have been one of the factors which triggered the respondent's improved practices. Mr. Maalouf testified that it was company practice to have either the District Manager or himself attend these monthly store meetings wherever possible, in order to receive the employees' input first-hand. At this particular meeting in the Belleville store in the month of November, however, both Mr. Maalouf and the District Manager were in attendance, and the Board would be hard pressed not to relate this coincidence to the organizing activity of the applicant at this time. This is particularly true in light of the fact that the applicant had seen fit to distribute its organizing material to employees through store management by mailing it to the respondent's stores in a series of individual

envelopes marked "Confidential", and addressed to "f.t. and p.t.", which was understood to mean the full-time and part-time employees at the store. Mr. Maalouf testified that a batch of these letters had been delivered to a store which had been closed, and that accordingly one of the letters was opened. Mr. Maalouf testified that he then phoned the managers of the various stores and advised them of the content of the letters which they were receiving, and told them to hold the letters until they could be distributed at a meeting of employees. This, to the Board, is indicative of the fact that the respondent, and Mr. Maalouf, had more than a passing interest in the fact that another organizing campaign was being embarked upon. On the other hand, the respondent has other unionized outlets in the province at this time, and does not appear to have attempted to interfere in the process to any greater degree than its handling of the mail-delivered propaganda. The evidence with respect to the meeting is that the usual matters of interest to employees were discussed, and that the only mention of the union was to advise employees as to the contents of the letters that had been received, to indicate to employees that it was their right to join or not to join a union, and that the letters would be left on the counter for the benefit of any employee wishing to know more about the contents. There is no evidence of any promises or commitments being made by the respondent at that meeting with respect to any matters which might have been raised. The practice has been, as Mrs. Hood discovered at the first monthly meeting which she attended following her return to work, for management to simply note the concerns expressed by the employees at such meetings, and to provide management's reply at a later meeting, after the issues had been discussed at head office.

9. A final matter raised by the applicant in connection with the petition before the Board is the re-employment at this time in the Belleville store of a former manager who had been very popular with the employees. On the evidence, however, the Board is satisfied that the re-hiring of this manager arose out of events not related to the applicant's organizing campaign, and that the decision was in fact announced after the employees had already written their letters to withdraw the application.

10. The Board finds Mrs. Hood to be a credible witness, and is satisfied on the evidence that her manner of circulating the petition did not demonstrate the kind of unusual licence that would cause other employees to perceive her to be acting as the agent of management (compare *Morgan Adhesives Limited*, [1975] OLRB Rep. Nov. 813). Nor does Mrs. Hood's position as simply one of the two full-time employees known to regularly discuss the operation of the store with management alter the Board's conclusion. From the evidence before us, the Board is satisfied that Mrs. Hood made reasonable efforts at all times to keep the petition a matter amongst the employees themselves, and that her activities would have been perceived that way by the employees.

11. The Board does, however, have a concern over the "gap" in the evidence with respect to the original letter to the union, which was circulated in the form of a petition. Where a second petition has its genesis in an earlier petition, the Board has in a number of previous cases commented on the need for probative evidence with respect to the circumstances surrounding *both* petitions, even though only the later one is filed with the Board and relied upon by the petitioners. While the first document was not what is normally referred to as a "petition" (a document directed to the Board in response to notice of an application for certification), the substance and intent of the letter to the Union is so close to that of the subsequent petition to the Board, that the Board would be remiss not to consider carefully the weight to be attached to the absence of evidence from the employee directly responsible for the preparation and circulation of the first document. On the other hand, the fact remains that this

was not a document filed with or even directed to the Board, and that it was not prepared pursuant to the explanation and requirements set out in the Board's Notice to Employees. Bearing that in mind, the failure of the objecting employees to have attended the hearing with the person primarily responsible for that document is wholly understandable.

12. The Board has reviewed the cases relied upon by the applicant, and finds that they are roughly divisible into two groups. The first group of cases does not turn upon gaps in the evidence at all. Rather, they are cases where the evidence establishes that the first petition would have been clearly associated with management in the minds of the employee, and that the second petition was directly related to and "tainted" by the first. See *Fisher Governor Co. of Canada Ltd.*, [1968] OLRB Rep. Dec. 905; *Reel-Pack Ltd.*, [1965] OLRB Rep. Dec. 629; *Argo Cleaners*, [1965] OLRB Rep. Dec. 586; *Merchants Paper Co. (Windsor) Ltd.*, [1965] OLRB Rep. Apr. 12; *Rainbow Ready-Mix Ltd.*, 63 CLLC ¶ 16,259; *Lakehead Newsprint Ltd.*, [1961] OLRB Rep. Feb. 397; *Levi Strauss of Canada, Inc.*, [1972] OLRB Rep. Dec. 1041 and *General Crane Industries Ltd.*, [1974] OLRB Rep. Oct. 662.

13. The second group of cases does in fact deal with an absence of evidence with respect to a predecessor petition. In *Weyerhaeuser Canada Ltd.*, [1964] OLRB Rep. Feb. 599, the petitioner conceded that her own petition had been preceded by a series of petitions which had been circulated and subsequently delivered to the office of a lawyer. The petitioner also conceded that she knew absolutely nothing concerning the history of those previous petitions, and as a result, the Board as well was left with no knowledge in respect to those previous petitions. Similarly, in *Sentry Department Stores Ltd.*, [1968] OLRB Rep. Oct. 677 and [1968] OLRB Rep. Nov. 851, the document filed by the petitioner was identical to one which had been previously circulated and then filed with the petitioner's lawyer. The petitioner's only evidence as to the origination of *her* petition was that she had obtained from her lawyer a copy of the same document as was previously circulated. She had no idea who had instructed the lawyer with respect to the original document. Once again the Board found that it had to reject the petition before it, because, as it stated, it had *no* evidence as to the origination of the first document. Finally, the case of *Tri-Sure Products Ltd.*, [1970] OLRB Rep. June 324, involved a combination of the absence of evidence with respect to a prior petition, *plus* sufficient circumstances before the Board to cause it to view with concern and suspicion the origination of that earlier petition.

14. In the present case, the Board has before it considerable (but by no means complete) evidence with respect to the circumstances surrounding the origination and circulation of the first document. Mrs. Hood was in fact one of the first employees to engage in discussions about changing their minds, and wrote to the union a letter which, from her evidence, was similar to the one circulated. In this case, the existence of these earlier letters (including the one circulated) to some extent corroborates, rather than undermines, Mrs. Hood's own explanation of the genesis of the petition which she subsequently filed with the Board. While the absence of testimony from the employee most directly involved with the origination and circulation of the letter to the union leaves open the possibility of improper management involvement of which Mrs. Hood herself was unaware, Mrs. Hood's own knowledge of and association with the circumstances giving rise to these letters makes this possibility more remote than would otherwise be the case. In the absence of any evidence of generally improper interference or lack of restraint on the part of the respondent's management personnel in this case, the Board is not prepared to speculate to that degree.

15. In *Fuller's Restaurant*, [1980] OLRB Rep. Sept. 1289, the Board was faced with a

gap in the evidence with respect to delivery of the subject petition to the Board, and had this to say about the potential effect of gaps in the evidence generally, at paragraph 18:

... Because the onus is on the petitioners to satisfy the Board as to the voluntariness of the statement, and because the signing of a statement against the union after signing a card in support represents a sudden change of heart, any gap in the evidence from preparation to delivery to the Board may prove fatal in any given case. It is for this reason that the Board has put petitioners on notice as to the extent of the evidence which may be required. A gap in the evidence relating to the delivery of the statement to the Board when considered in conjunction with other gaps in the evidence relating to custody of the document or in conjunction with evidence suggesting company involvement may cause the Board to find that it has not been satisfied as to the voluntariness of the statement. The Board, however, has never rejected a petition simply for the reason that it lacked first-hand evidence of the delivery of the document. The issue is one of voluntary expression and if the Board is satisfied that the origination and preparation of the statement is free of employer interference and is further satisfied that each of the signatures has been obtained in circumstances which would not thwart free expression and where, as in this case, a legitimate reason exists for the absence of the person who mailed the petition, the Board would be hard pressed to find that it had not been satisfied as to the voluntariness of the statement.

As noted, the first document was not even a “petition” to the Board, and the Board draws no inference of a deliberate intent to avoid scrutiny from the failure of the circulator of that document to attend the hearing. Perhaps more important is the lack of overt interference by the respondent in general. The meetings with employees had by November become a well-established practice, and there is no evidence that the respondent took undue advantage of these meetings to overstep the bounds of permissible employer comment. While the manner chosen by the respondent to distribute the applicant’s propaganda was a good deal less than perfect, it must be recalled that it was the applicant itself that initially involved store management in the distribution of its propaganda to unnamed employees through the unusual and presumably economical method of campaigning adopted in this case. The Board does not find that this factor alone creates the kind of background which would cast the present petition in doubt. For another recent case in which the restrained response of the employer became critical to the Board’s ultimate conclusion that a petition was voluntary, see, *Catfish Calhoun Inc.*, [1981] OLRB Rep. Nov. 1551.

16. For the foregoing reasons, the Board finds that the present petition represents a voluntary expression on the part of the 17 employees who signed it, and exercises its discretion pursuant to section 7(2) of the *Labour Relations Act* to direct the taking of a representation vote.

17. The voting constituencies will be as follows:

- (1) All employees of the respondent employed at the City of Belleville, Ontario, save and except store manager, persons above the rank of store manager, persons regularly employed for not more than 24

hours per week and students employed during the school vacation period (unit #1); and

- (2) All employees of the respondent in the City of Belleville, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except store manager and persons above the rank of store manager (unit #2).

18. For the purpose of clarity, the Board notes that any of the "seasonal" employees referred to in this decision would form part of the part-time voters' list.

19. All employees of the respondent in the voting constituencies on the date hereof who have not voluntarily terminated their employment or who have not been discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

20. The Board directs that Rhonda Chapman, Assistant Store Manager, whose status remains in dispute, be permitted to vote, but that her ballot be segregated until further direction by the Board.

21. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

22. The matter is referred to the Registrar.

2028-81-R Domenic Panucci, Applicant, v. Teamsters Local Union No. 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Respondent, v. Darrigo's Supermarkets Ltd., Intervener

Termination – Practice and Procedure – Application based on failure to give notice to bargain – Application supported by petition of eight of nine employees – Respondent filing no reply and not appearing at hearing – Board terminating bargaining rights without vote

BEFORE: R. D. Howe, Vice-Chairman, and Board Members L. Hemsworth and S. Cooke.

APPEARANCES: *Domenic Panucci for the applicant; no one appearing for the respondent; Robert Howard for the intervener.*

DECISION OF THE BOARD; January 15, 1982

1. This is an application under section 59(1) of the *Labour Relations Act* for a declaration that the respondent trade union no longer represents the employees in the bargaining unit for which it is the bargaining agent.

2. Section 59(1) provides as follows:

"If a trade union fails to give the employer notice under section 14 within sixty days following certification or if it fails to give notice under section 53 and no such notice is given by the employer, the Board may, upon the application of the employer or of any of the employees in the bargaining unit, and with or without a representation vote, declare that the trade union no longer represents the employees in the bargaining unit."

Also relevant to the present application is section 14, which provides:

"Following certification, the trade union shall give the employer written notice of its desire to bargain with a view to making a collective agreement."

3. The application was filed with the Board on December 17, 1981. No reply to the application was filed by the respondent. Although the respondent was duly notified that the hearing of this application by the Board would take place at its boardroom, 400 University Avenue, Toronto, Ontario, on Thursday the 14th day of January, 1982, at 9:30 a.m., no one appeared on behalf of the respondent when the case was called at that time. As a matter of courtesy, the Board recessed the hearing until 10:00 a.m. in view of the possibility that the representative(s) of the respondent might have been delayed. When no one appeared on behalf of the respondent by 10 o'clock that morning, the Board proceeded to hear the application.

4. By decision dated October 14, 1981, in File No. 1365-81-R, the Board, differently constituted, certified the respondent trade union as bargaining agent for "all employees of [the intervener] at its warehousing operations in Metropolitan Toronto, save and except supervisors, those above the rank of supervisor, part-time [sic] and students employed during the school vacation period".

5. Having regard to all of the evidence and the submissions of the parties, the Board finds that the respondent trade union failed to give the intervener employer notice under section 14 within sixty days following certification. Moreover, it appears that no such notice had been given by the date of the hearing of this matter. As noted above, the respondent trade union filed no reply to this application and did not appear at the hearing. Thus, the Board was provided with no explanation whatever for the respondent's failure to exercise its bargaining rights.

6. The application was filed by an employee in the bargaining unit. The applicant also filed in support of the application a document that we find to have been voluntarily signed by eight of the nine employees in the bargaining unit on the date of the application. The heading on that document reads:

"We, the undersigned employees, of Darrigo's Supermakets Ltd., 55 Plywood Place, Toronto, Ontario, working at its warehouse in Metropolitan Toronto freely wish not be represented by the Teamsters Local Union 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America."

7. The purpose of section 59(1) is to protect the employees (and, in a proper case, the employer) against a union which stakes out a claim to represent certain employees and then fails to give the employer notice under section 14 within sixty days following certification, thereby sleeping on its bargaining rights and neglecting to forward the interests of those employees. As has been indicated by the Board in a number of cases, section 51 should not be used to penalize a union but rather to afford an opportunity for an interested party to bring the material facts to the attention of the Board so that the Board can call upon the trade union to provide an explanation for its failure to give notice under section 14 within the time period specified in section 59(1), or to provide an explanation for its failure to commence (or continue) bargaining in cases to which section 59(2) is applicable. (See, for example, *Trizec Equities Limited*, [1978] OLRB Rep. Feb. 189 and the Board jurisprudence cited therein.)

8. The Board has generally exercised its discretion under section 51 to terminate bargaining rights without a vote where the trade union fails to file a reply and appear at the hearing to provide a satisfactory explanation for its failure to serve notice under section 14 within the time period specified in section 59(1), or to commence (or continue) to bargain within the time period specified in section 59(2). (See, *Fullers Restaurant*, [1981] OLRB Rep. Feb. 156 and the numerous authorities cited therein.)

9. Having regard to all of the circumstances, the Board is of the view that this is an appropriate case in which to exercise its discretion under section 59(1) to terminate the respondent's bargaining rights without a representation vote. Accordingly, the Board hereby declares that the respondent no longer represents the employees of the intervener in the bargaining unit set forth above, for whom the respondent has heretofore been the bargaining agent.

1373-81-U Radenko Bukvich, Victor Clarke, Michele D'Alonzo, Miodrag Psodorov, and Peter Lazaridis, Complainants, v. Local Union 304 Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Respondent, v. **Dufferin Aggregates**, A Division of Dufferin Materials and Construction Ltd., Intervener.

Duty of Fair Representation – Unfair Labour Practice – Collective agreement prohibiting lay-offs and requiring work sharing – Union negotiating amendment to allow lay-offs according to reverse seniority – Whether employees with least seniority laid off represented unfairly – Whether economic circumstances sufficient objective justification for union's actions

BEFORE: M. G. Picher, Vice-Chairman.

APPEARANCES: *J. D. G. Douglas for the complainants; J. C. Nelson and J. McNamee for the respondent; W. S. Cook and N. S. Roe for the intervener.*

DECISION OF THE BOARD; January 18, 1982

1. This is a complaint under section 68 of the *Labour Relations Act*. The five grievors were laid off from their jobs as dependent contractor owner-operators of tandem trucks working out of a quarry at Milton operated by Dufferin Aggregates. The unusual twist is that their layoffs were, in effect, initiated by the union. The grievors claim that the actions of the union which resulted in their layoffs were in violation of its duty of fair representation described in section 68 of the Act.

2. The facts are not in dispute. In July of 1978 the respondent was certified by this Board as bargaining agent of all drivers working at or out of the Milton quarry (Board File No. 1880-76-R). There were forty-five employees in the bargaining unit at the time of certification. Since then two collective agreements have been negotiated. The current agreement, the product of a strike in the summer of 1980, is in effect from June 15, 1980 until December 31, 1982.

3. When the current collective agreement was executed, the unit numbered thirty-four drivers. Because of the nature of the services rendered, with drivers being paid by the load, the company is indifferent as to the number of drivers in the quarry as long as there are enough to handle the work available. The drivers on the other hand, who own their own trucks and have considerable financing costs and operating expenses to meet, are concerned with keeping a limit on the number of trucks in the quarry, to maximize their own revenues. To that end the following provisions were negotiated into the collective agreement:

ARTICLE IV

4.01 The Company will establish a drivers' list based on seniority. The number of drivers on such list shall not exceed thirty-four (34) but, if the Company proposes to increase such number it may do so after discussion with the Union Representative. Seniority shall mean total length of service with the Company. It is understood that this clause does not apply to temporary hiring to cover daily fluctuation of business.

4.02 There shall be no layoff during the life of this Agreement, it being understood that the drivers will share available work in accordance with present practice.

4.03 Drivers will receive available loads in accordance with the practice presently in effect.

4.04 The Company is entitled to call in truckers not on seniority list as it sees fit provided that, so far as practicable and the requirements of the Company's customers can be met satisfactorily, drivers on the seniority list shall have first call on loads at all times.

4. The evidence establishes that conditions in the industry have caused a continuing attrition in the number of drivers in the bargaining unit. At one time there were fifty-six drivers at work. There were forty-five at the time of certification. Shortly before the layoff that is the basis of this complaint, there were thirty-three drivers, three of whom quit. After the layoff, at the time of hearing, there were twenty-one owner-operators at work.

5. The dependency of the drivers in the bargaining unit on the work available at Dufferin is a matter of record. They do not obtain any meaningful income from alternative sources; as the Board's certification decision indicates, practically one hundred per cent of the income of the drivers is derived from the Dufferin quarry (see *Dufferin Aggregates*, [1978] OLRB Rep. Mar. 278 at 280). There was no suggestion in the evidence before us that that has changed over the last three years.

6. The hardship experienced by the drivers is due in part to a general decline in the construction industry and to an increased use of independent trucking contractors who operate larger tractor trailer units. The evidence of owner-operator Radenko Bukvich establishes that things were especially lean in December of 1980 and January of 1981; for a period of five or six weeks he obtained practically no loads. At about that time a movement began among some of the drivers to change the collective agreement so that the company could have the right to lay off drivers by seniority. At that time Martin E. O'Brien, then the trucking supervisor of the company, made no secret of the fact that in his opinion the company could operate efficiently with twenty-five trucks rather than thirty-four. There was then little reason to doubt that the company would respond to an initiative of the union to amend the collective agreement to allow it to lay off junior drivers and distribute the available work among a smaller pool of senior drivers.

7. A group of senior drivers began to act on that prospect through the early months of 1981. A petition favouring the insertion of a layoff provision in the collective agreement was circulated among the senior drivers. As a result a meeting of the bargaining unit was held on June 3, 1981 to entertain a motion which would have authorized the union executive to re-open negotiations with the company to amend the no-layoff provision of the agreement. The motion passed by a margin of 14 to 10. The union executive, however, under the direction of Mr. Cameron Nelson, the full-time union officer who chaired the meeting, ruled that the vote was not sufficient to authorize re-opening the contract because it was passed by only a minority of the employees eligible to vote. It appears that under the union's rules a change of that magnitude requires a majority of all employees in the bargaining unit. As a result, Mr. Nelson, who had earlier told the meeting that in his opinion the motion was ill-advised and

against the best interests of all of the employees, advised the owner-operators that the *status quo* would continue.

8. Undaunted, the senior drivers, led by shop steward A. Levin, petitioned again. A further meeting was held on July 13, 1981. As with the first meeting and a subsequent meeting on August 19, 1981, it is clear that all drivers in the unit got notice of the meeting and of the issue to be discussed and had a reasonable opportunity to speak and vote on the motion presented.

9. At the meeting of July 13, 1981, Mr. Nelson reiterated his personal opposition to removing the layoff prohibition from the collective agreement. He reminded the drivers that while senior drivers might be able to weather a first layoff they could be caught by bigger layoffs in the future. After some two hours of heated discussion a secret ballot vote was taken: the motion to re-open the contract carried 18 to 12, a majority of the employees in the bargaining unit.

10. The inevitable followed. The union executive, bound to carry out the wishes of the majority, approached the company and negotiated an amendment of the collective agreement. The amendment, tentatively agreed to on August 14, 1981, provided:

WHEREAS the parties hereto are parties to a collective agreement covering a bargaining unit of dependent contractor owner-drivers dated June 18, 1980;

The parties hereby agree that, subject to ratification:

1. Article 4.02 of the aforesaid collective agreement shall be deleted and a new Article 4.02 shall be substituted. The new Article shall read as follows:

'4.02 Should the Company find it necessary to lay-off members of the bargaining unit due to lack of work, it shall do so in reverse order of seniority. During periods of lay-off, the Company shall maintain a lay-off list of drivers and shall recall them in order of seniority when work becomes available. Recalls shall be effected by telephone call and, if necessary, by telegram or registered letter sent to the driver's last known address. The Company will also advise the Union when it intends to lay-off or recall a driver.'

11. On August 19, 1981, a final meeting of the bargaining unit was held to ratify the amendment. That meeting, again chaired by Mr. Nelson, is not irregular in respect of its procedures. The evidence establishes that adequate notice and a full opportunity to participate and vote was afforded all drivers in the bargaining unit. As expected, after a predicably stormy meeting, the amendment was ratified.

12. Two weeks later, by letter dated September 3, 1981, the company notified the union that nine drivers were laid off effective 5:00 p.m., September 4, 1981. There can be little doubt that the layoff had a harsh impact on the drivers affected. One of the grievors, Mike

D'Alonzo, was unable to find other haulage work and was forced to sell his truck because of an inability to meet his finance payments. Mr. Bukvich testified that because of his financing obligations he may have to choose between losing his truck and losing his house. He is angry that the union could have permitted such a result through a process which he described as "the rich getting together . . . voting member against member".

13. Counsel for the complainants attacks the actions of the union in re-opening the contract on two grounds. Firstly he submits that the process of amendment was contrary to the duty of fair representation under section 68 of the Act. Secondly he maintains that the purpose and result, benefitting the majority at the expense of the minority, is itself contrary to the section.

14. It is submitted on behalf of the complainants that there was something less than good faith or an honesty of purpose in the manner in which the amendment was brought about. Their counsel also argued that in arriving at its decision the union did not adequately balance the interests of the two competing groups and failed to consider whether the benefit of the majority outweighed the harm to the minority.

15. In challenging the result counsel for the complainants reiterates the imbalance of interests. He argues that while a union might in some circumstances have to make decisions adverse to a group of employees, it must have compelling reasons to do so. In his submission the transfer of profits from one group to another, particularly when the individuals concerned are contractors who compete for work in the same marketplace, is not a good faith exercise of the duty of fair representation, and may in fact constitute a restrictive trade practice. He argues that that is the more so where the union's action is at its own initiative to disturb a collective agreement in mid term. He submits that the union could not without discrimination, arbitrariness or bad faith disturb the vested right of the drivers to be protected against layoffs for the duration of the collective agreement. He emphasizes that the terms of that agreement were gained in part from a long and difficult strike to which the laid off drivers made a substantial contribution. In his view the actions of the majority were designed purely to expropriate for themselves the business and profits of the minority in circumstances that did not justify such extreme action, and are inconsistent with the union's duty of fair representation of all of the drivers.

16. Counsel for the union submits that there has been no violation, either procedurally or in substance, of the duty of fair representation. In his submission the bargaining unit was faced with a degenerating economic condition characterized by a shrinking demand for the drivers' services. He argues that when the drivers were faced with the harsh reality of a declining amount of work they were entitled, by the open and democratic means of union majority rule, to opt for a different way to slice the pie. He submits that by choosing the time-honoured means of attrition by seniority the union had adopted an accepted industrial relations rule and had not singled out individuals for arbitrary, discriminatory or bad faith treatment. In response to the complainant's charge that they have been victims of a tyranny of the majority, counsel for the union responds that after all the union is a democratic institution in which the wishes of the majority must govern. He maintains that to the extent that in this case those wishes were expressed and executed without arbitrariness, discrimination or bad faith, through a process of open and fair deliberation followed by a secret ballot vote, there can be no violation of the duty of fair representation.

17. Allocating work and wages, whether in scarcity or in plenty, is the central fact in any scheme of collective bargaining. The struggle between union and management over the division of profits in the form of wage and benefits settlements usually gets the bulk of public attention. The less visible question, however, of which employees will work and how much they will get is often no less important. It may generate as much heat inside the union hall as does the confrontation with the employer outside. That kind of internal union tension stands in high relief in the facts of this case.

18. There are those who maintain that it is inconsistent with the duty of a trade union to fairly represent individual employees for the union to take steps that will prejudice employees' vital job interests, including their job security. That view has generally been associated with the argument for an absolute right of individuals to have access to arbitration for such serious consequences as the loss of their employment. (See, e.g. Blumrosen, *Legal Protection for Critical Job Interest: Union Management Authority Versus Employee Autonomy* (1959), 13 Rutgers L. Rev. 631.)

19. The fact, however, that a union may be required in bargaining to make a hard decision that has a serious economic impact on individuals, up to and including the loss of their jobs, cannot of itself make that decision unlawful. That kind of decision is, moreover, not unusual. In making collective agreements it is practically impossible for unions to avoid making decisions that benefit one class of employees at the expense of another. For example when a union opts for more wages rather than better pension provisions it benefits its younger members rather than the older ones. Trade-offs of that kind are the everyday stuff of collective bargaining.

20. Under the *Labour Relations Act* such decisions are lawful so long as they are not arbitrary, discriminatory or in bad faith within the meaning of section 68 of the Act. In the knowledge that unions are commonly required to make hard decisions affecting their members, those words have been deliberately chosen by the Legislature to avoid undue interference in the internal affairs of trade unions. The Board's powers of review over union actions under the section go only to matters of representation, when the quality of representation falls below the limited threefold standard set out in section 68. The issue in these proceedings, therefore, is whether the union's decision to re-open the contract and effectively allow junior employees to be laid off was arbitrary, discriminatory or in bad faith.

21. There is nothing inherently unlawful in a union making a decision that favours a group of employees over another. From the earliest decisions interpreting section 68 of the Act the Board has recognized the need for unions to have the latitude to make decisions that may favour certain employees at the expense of others. As the Board put it in *Ford Motor Co. of Canada Ltd.* [1973] OLRB Rep. Oct. 519, in applying what was then section 60 of the Act, (at pp. 525-26):

In practical terms the relationship between members of the bargaining unit and the trade union is one of majority control. The relationship is not strictly one of contract between employee members of the union and the union, but rather the relationship is such that the system created more closely resembles the Legislative process than a contractual relationship; see Cox, *Rights Under a Collective Agreement*, 69 Harv. L. Rev. 601 (1956).

Section 60 of *The Labour Relations Act* seeks to ensure that individual's rights are not abused by the majority of the bargaining unit; it is an attempt to achieve a balance between the individual interests and the majority interest by recognizing that the exclusive bargaining agent has a duty to consider all the separate interests in the performance of its obligations. The duty has been described as the duty of fair representation. The emphasis is on fairness — it is a duty to act fairly in the interests of all members of the bargaining unit, minority factions, as well as majority factions, individual employees, as well as the collective group, members as well as non-members, craft employees as well as industrial employees. It is not a duty which makes the union the guarantor or insurer for every situation in which an individual employee is aggrieved or adversely affected; rather, the statute attempts to have the union consider the position of all groups and to weigh the competing interests of minorities, individuals and other like groups in arriving at its decision.

22. In this case the complainants ask the Board to conclude that the decision to effectively eliminate the jobs of a minority is in itself a violation of the duty to fairly represent the members of the minority. Counsel for the complainants argues that the grievors had a contractual right and expectation to work out of the quarry over the life of the collective agreement, and that to re-open the contract to undo that right is a violation of their vested rights inconsistent with the duty of fair representation.

23. As compelling as that argument may seem, in my view it does not assist the understanding of the issue to simply assert that the members of a minority have an absolute right to be protected against negative consequences to their job security. The collective agreement is a contract made between the employer and the union. They are the parties to it, and any benefits which it confers on individual employees are necessarily subject to the possibility of amendment between the parties. In this regard it should be recalled that a collective agreement is not “a bundle of individual contracts between employer and employee negotiated by the union as agent for the employees”. (*Syndicat Catholique des Employés de Magasins de Québec, Inc. v. Compagnie Paquet Ltée*, [1959] S.C.R. 205; (1959), 18 D.L.R. (2d) 346; *McGavin Toastmaster Ltd. v. Ainscough* (1975), 54 D.L.R. (3d) 1 (S.C.C.))

24. That is not to say that a trade union can with impunity disregard the interests of the employees it represents or take either a hostile or an indifferent attitude where employees' critical interests are at stake. In discharging its duty to fairly represent all of the employees in a bargaining unit a union must address its mind to the circumstances of those who may be adversely affected by its decision. It has a duty to weigh the competing interests of the employees it represents and make a considered judgement the procedure and result of which must be neither arbitrary, discriminatory nor in bad faith.

25. Counsel for the complainants submits that in this case the union has not properly balanced the interests of the two groups of employees involved. He argues that if the union cannot show that the marginal advantage which the union's decision gives the majority outweighs the disadvantage to the minority, it has violated the duty of fair representation. In other words, he maintains that the union must justify its decision, and absent such justification the Board should conclude that the union's action is in violation of the duty of fair representation.

26. That submission must be considered with great caution. To adopt that standard in an unqualified way risks placing the Board in the position of being the arbiter of the political correctness of a union decision. The weighing of competing interests and the ultimate choice as to which outcome is preferable is a highly subjective decision, inevitably influenced by the inherent values, viewpoints and preferences of the decision maker. In the collective bargaining context such choices are highly political, and to that extent unions are required to act as responsive political bodies.

27. In bargaining changes that affect the competing interests of employees a union has a two stage involvement: firstly it must be the forum for resolving the conflict between sometimes irreconcilable employee interests; secondly it must act as the spokesman for the interests that carry the day. Once the internal choice is made the union must approach the employer with the force and conviction of a body with a single voice. To view the union in this later stage as the antagonist of the minority is to misconceive the process. Professor Cox, in discussing the processing of grievances, usefully summarized this dimension of union activity as follows:

When the interests of several groups conflict, or future needs run contrary to present desires, or when the individual's claim endangers group interests, the union's function is to resolve the competition by reaching an accommodation or striking a balance. The process is political. It involves a melange of power, numerical strength, mutual aid, reason, prejudice, and emotion. Limits must be placed on the authority of the group, but within the zone of fairness and rationality this method of self-government probably works better than the edicts of any outside arbiter. A large part of the daily grist of union business is resolving differences among employees poorly camouflaged as disputes with the employer.

(Cox, "*Rights Under a Labour Agreement*", (1956), 69 Harv. L. Rev. 601 at 626-27.)

28. The weight of authority supports the view put forward by counsel for the complainants that special considerations attach to any decision by a union that alters or abrogates the job security of employees. That is especially true in relation to seniority rights. Seniority rights, built up over time, usually over a number of successive collective agreements, represent an employee's stake in critical interests such as promotion, pension rights and his rights of layoff and recall. The concept of seniority comes as close as any to approximating a form of industrial relations property right for the individual employee, and its consideration by labour boards in fair representation complaints is particularly instructive.

29. The special consideration attaching to decisions affecting seniority in assessing the duty of fair representation was expressed as follows by the B.C. Labour Relations Board in *B.C. Distillery Company Limited*, [1978] 1 Can L.R.B.R. 375 at 381:

... The fact of the matter is that existing seniority clauses take on a much more compelling hue than other contract clauses. This is a good statement of the reasons why:

... Seniority enables an employee to acquire valuable interests by

his work, to capitalize his labor and obtain something more than a day's wages for his continued production. When seniority determines promotion rights, it gives the employee a claim to better jobs when they become available; when seniority determines the order of layoff, it provides the employee a measure of insurance against unemployment. Seniority does not guarantee that vacancies in higher rated jobs will be filled or that any jobs will be available; but by giving the senior employee priority when a choice is made as to who will be promoted or who will remain employed, seniority gives an employee an interest of substantial practical value. As Professor Aaron has pointed out, more than any other provision of the collective agreement . . . seniority affects the economic security of the individual covered by its terms, and it has understandably come to be viewed as one of the most highly prized possessions of any employee. Seniority may be the most valuable capital asset of an employee of long service.

Summers and Love. *Work Sharing as an Alternative to Layoffs by Seniority*, (1976), 124 U. of Pa. L.R. 893, at p. 902.

Employees in the plant know their position on the seniority list. They believe that they have earned the spot by their long service. They have firm expectations that that position will remain unaltered. Suppose then that the union and the employer negotiate a change in that clause, one which has the effect of re-shuffling positions on the seniority list. How does the adversely affected employee naturally perceive that contract change? He believes that the parties have simply taken a valuable asset belonging to him and given it to another employee. That perspective is most dramatic in a layoff situation in which the total number of jobs in the plant is being reduced:

In a layoff situation, however, seniority takes on an importance of a wholly different determination necessarily carries with it all the other employment rights ordered by seniority — overtime, shift preferences, promotions, and the rest. In addition, layoff may jeopardize or destroy other valuable rights attached to employment or accumulated by long service. Layoff may result in termination of group medical or life insurance which the employee cannot afford to continue individually. If the layoff continues long enough to terminate seniority the employee may lose the longer vacations, accumulated sick leave, longevity pay, and perhaps even pension benefits, earned by length of service. When employees are confronted with mass layoffs, the symbolic and real importance of seniority is most compelling; deviation from the order of seniority is viewed as repudiation of 'vested right'. It deprives the senior employee not only of his security but of all other values he has earned by his length of service.

Summers and Love, pp. 904-905.

And for these pragmatic reasons, the law simply cannot take the attitude that because the union and the employer freely negotiated the original seniority clauses, they are also able to change that existing clause at will. As Professor Archibald Cox has said: "*When established seniority rights are changed, the bargaining representative should be required to show some practical justification beyond the desire of the majority to share the job opportunities theretofore enjoyed by a smaller group,*" (Cox, *The Duty of Fair Representation*, (1957), 2 Villanova L.R. 151 at p. 64.)

[Emphasis added]

30. This case involves the elimination of a work sharing guarantee in favour of a provision of layoffs by seniority. A work sharing provision is one of a number of means, like seniority, like provisions prohibiting the contracting out of bargaining unit work, or like classification schemes, whereby job security can be directly affected. It is obviously a fundamental provision in any collective agreement, expressing as it does the choice and expectation of the employees respecting the allocation of work in times of scarcity. Commonly associated with the garment industry, work sharing represents a choice made by employees that in the even of hard times they will share the shrinking volume of work available rather than sever some employees from their jobs for the benefit of the remainder. That approach is readily understandable among dependent contractors who, like the complainants, operate with substantial capital investments in markets that fluctuate both with the economy and with the seasons. A hauler is arguably less secure if he is subject to layoff and recall at the discretion of this employer than if he has a contractual guarantee of a place in the quarry.

31. Work sharing has deep and abiding importance for the employees who are under it. Because it impacts on job security it represents an employee interest just as critical as a seniority provision. Action by a union to change or eradicate a work sharing or no-layoff provision must, therefore, be viewed seriously and be judged by the same standards as a change in seniority provisions. That is particularly so where, as here, employees have had the security and benefit of such a provision through successive collective agreements. The impact in this case is more dramatic still: as dependent contractors the complainants do not contribute to the Unemployment Insurance scheme. For them the consequences of a layoff are particularly hard, and the analogy to a change in seniority ranking provisions is extremely close. The decisions of the courts and labour boards on the relationship between seniority and the duty of fair representation therefore deserve close analysis.

32. The first full judicial elaboration of the issue of a union resolving competing approaches to seniority arose in the decision of the Supreme Court of the United States in *Ford Motor Company v. Huffman* (1953) 31 L.R.R.M. 2548. The case involved the negotiation of a clause in a collective agreement which would enable returning military veterans to use their military service prior to employment as credit towards their seniority. The authority of the union to negotiate such a proviso was challenged by union members who had worked longer than the veterans, but would accumulate less seniority under the new arrangement. The court held that "[a] wide range of reasonableness must be allowed" the bargaining representative (at 2551):

Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions

and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented . . . Inevitable differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

The Court went on to conclude that in agreeing to give seniority credit for military service the union had not breached the duty of fair representation.

33. The duty was considered further in *Roberts v. Lehigh and New England Railway* (1963) 54 LRRM 2265, a decision of the U.S. Court of Appeals, 3d Circuit. In that case the emphasis was placed on the legitimacy of the majority opinion in the union expressed through voting procedures. The company wished to revise a collective agreement to provide for the compulsory retirement of employees on reaching the age of 65. The proposal was initially rejected by the majority in a referendum ballot. Subsequently 30 employees who were over 66 years of age were laid off. The proposal was resubmitted and the majority accepted. The plaintiffs were involuntarily retired and alleged a breach of the union's duty of fair representation towards them. The court held that there existed no such breach because there was no evidence of "hostile discrimination" against the plaintiffs. The court adduced two principal reasons for its conclusion: first, that "[e]ach lodge consented to the inclusion of the provision in the agreement only after a majority of members voted in favor of it" (at 2267); second, "[t]he fact that the provision may favor younger workers who outnumber older ones with greater seniority rights is not a basis for a claim of hostile discrimination" (at *id.*).

34. In my view the rationale of the *Lehigh and New England Railway case* is not compelling. The assertion that the will of the majority is a full answer to a charge of unfair representation has been subjected to strong criticism. (See Boyce, *Fair Representation, the NLRB and the Courts*, 1978, Industrial Research Unit, University of Pennsylvania.) Moreover, that approach is not consistent with the qualification expressed by Professor Cox in the passage cited in paragraph 29 above. The Board agrees with the view expressed by Professor Cox that a union transferring the job opportunities of a minority to a majority must be required to show some objective justification beyond the majority will. Predatory practices are not justified simply because they are implemented by a vote of the majority. To so conclude would be to eliminate any real protection to minorities, a result clearly inconsistent with the very origins of the duty of fair representation (*Steele v. Louisville and Nashville Railroad Company* (1944), 15 L.R.R.M. 708 (U.S.S. Ct.)

35. More recent U.S. decisions have, like the decision of the B.C. Board in the *B.C. Distillery* case, supra, stressed that when a majority transfers to itself employment advantages previously enjoyed by a minority it must show some objective justification beyond the mere will of the majority. The case of *Barton Brands Ltd. v. NLRB* (1976) 529 F 2d 793; 91 LRRM 2241 (U.S. C.A. 7th Circuit) is an example. In the wake of the closing of one plant and the merger of two companies the union negotiated to alter seniority rights and entail the seniority lists. Employees had initially voted for dovetailing when it was believed that a new plant would

open. The union's endtailing negotiations began when it learned that the plan to open a new facility had been abandoned. The Court held that seniority rights, once established, cannot be expropriated simply for the benefit of the majority (at L.R.R.M. 2246):

In summary, since the established seniority rights of a minority of the Barton employees have been abridged by the 1972 collective bargaining agreement for no apparent reason other than political expediency, there seem to be sufficient grounds in this case to support the Board order . . . in order to be absolved of liability the Union must show some *objective justification* for its conduct beyond that of placating the desires of the majority of the unit employees of the expense of the minority.

(emphasis added)

(See also *Truck Driver Local 568 v. NLRB (Red Ball Motor Freight, Inc.)* (1967) 65 LRRM 2309 (U.S.C.A. D.C.); *NLRB v. Teamsters Local 315 (Rhodes and Jamieson, Ltd.)* (1976) 93 L.R.R.M. 2747, U.S.C.A. 9th Circuit; *Beriault v. Warehousemen's Union* (1978) 97 L.R.R.M. 2955 (U.S. Dist. Ct., Oregon). These decisions reflect the same approach taken in Canada by the Board in *B.C. Distillery supra*.)

36. In this case a majority of the union has transferred to itself work opportunities previously enjoyed by a minority. The issue then becomes whether the evidence discloses an objective justification for the union's action.

37. The Board must obviously use great care in assessing what is and what is not objective justification for a union's decision, particularly a decision relating to choices as to the allocation of goods in conditions of scarcity. In my view it would be clearly inappropriate for the Board to substitute its own view for the union's by simply asking itself whether it would have acted differently. To do that is to substitute one subjective standard for another, and not to consider the issue of objective justification. The appropriate standard to be adopted by this Board is not unlike that expressed by the Court in the judicial review of the decisions of arbitrators: the Board should ask not whether the decision is right or wrong or whether it agrees with it — rather it should ask whether it is a decision that could reasonably be made in all of the circumstances, even if the Board might itself be inclined to disagree with it. Used in this sense "reasonable" must mean by the rational application of relevant factors, after considering and balancing all legitimate interests and without regard to extraneous factors.

38. In this case the evidence leaves little doubt that the union was faced with a deteriorating economic situation in early 1981. The number of trucks in the quarry had been continuously reduced by attrition over the previous three years. Following the strike in the summer of 1980 conditions had continued to decline with some ten or eleven owner-operators leaving the quarry. In January of 1981 to remain competitive the drivers agreed to postpone the implementation of a negotiated rate increase from January 1, 1981 to April 1, 1981. In May the union agreed to drop the haulage rate by a further 25 cents in hopes of remaining competitive with independent truckers and retaining a larger volume of work. Because of the downturn in construction generally, and the increased use of larger independent trailer trucks, the drivers in the bargaining unit were only barely surviving.

39. In this regard the evidence of Milovan Stanisic is particularly instructive. Called as a witness by the complainants, Mr. Stanisic has worked as a driver in the quarry for nine years.

He believed he stood approximately 17th or 18th in seniority at the time the issue of re-opening the contract arose. Mr. Stanisic favoured the layoff provision. By his own unchallenged account, he did not know what number of employees would be laid off if the contract were re-opened and was given no assurance that he would not. He decided however, that he would be better off either out of the quarry entirely, working elsewhere, or in the quarry sharing a viable volume of work among a smaller number of trucks. In his own words "I had to protect myself, sitting there doing little work with high costs — I had to protect myself from going out of business". For Stanisic marking time in the quarry was intolerable; he preferred the risk of layoff with the alternative chance of better work in the quarry, to the seemingly hopeless stagnation of the previous months.

40. That is not to say that Stanisic's view was shared by everyone. To be sure, there were employees at the top and bottom end of the seniority list for whom the outcome of a layoff would be more predictable. There is, however, no evidence to suggest that the truckers could know with any certainty where the cut-off point would be in a layoff. There was inevitably a number in the middle of the scale for whom, like Mr. Stanisic, the outcome could not be certain. It is significant that these employees, no less than the most junior and most senior, had to make a choice between work sharing and layoffs by seniority. It would be unrealistic to think that most if not all drivers voted without giving some thought to their chances of survival. The fact, however, that some drivers in the position of Mr. Stanisic were willing to risk the unknown on the simple basis that the economic *status quo* was intolerable to them is in my view a compelling factor in understanding the decision which was made and assessing the objective justification for it.

41. This was a crisis decision — like a decision about how to determine who will survive in an overcrowded lifeboat. If the union had decided to transfer work from the minority to the majority in a time of relative prosperity, where its obvious motive was to increase the already profitable position of some drivers at the expense of others, it would be difficult to avoid the conclusion that its decision was in violation of the duty to provide representation free of invidious favoritism. That is clearly not the situation. I am satisfied on the evidence that continued economic hardship forced the union's members to question and eventually to reject the wisdom of the work sharing provision in their collective agreement. For them sharing the work, or more accurately, sharing the lack of it, was no longer a viable means of doing business as dependent contractors.

42. In reaching its decision did the union adequately balance the competing interests of the majority and the minority? In considering that question it is helpful to weigh the relative advantages and disadvantages of work sharing for all of the truckers. For them work sharing was not a guarantee against unemployment. Under the collective agreement as it stood before it was re-opened there was ample scope for attrition in the quarry. The only difference under work sharing as compared to under layoffs by seniority is that as the volume of work diminished attrition would be by order of poverty. Drivers with greater financial obligations would be less able to survive lean periods than those who owned their trucks outright. Under that system, given continual shrinkage, the poor would go first and the rich would go last.

43. The drivers were in a "no win" situation. Absent an upturn in the volume of business (in which case layoffs would not be a problem) someone was going to be hurt by the economic pressure. In these circumstances can the union be faulted for choosing an alternative by which those with the longest investment of service in the quarry should go last? The union was not

content with a system which, in effect, gave the shrinking work in the quarry to those with the financial strength to bid for it. It chose instead to let seniority prevail. In asking whether the ultimate decision is one that could be reasonably made I do not see how the union can be faulted for preferring what a particularly helpful study has called a political mode of allocation over a market mode of allocation in a time of scarcity. (See Calabresi and Bobbitt, *Tragic Choices*, New York, 1978, at pp. 31-41).

44. This Board cannot conclude that in the difficult circumstances facing it, the union's decision to alter its system of work allocation was without objective justification. Without ignoring the hardship on the junior employees who were eventually affected by the union's decision, I must conclude that the decision to renegotiate the work sharing provision was one which the union was entitled to make in the circumstances, and that neither the motive nor the consequences of its decision violated its duty of fair representation. For reasons elaborated above, I am also satisfied that the procedure followed by the union was free of arbitrariness, discrimination or bad faith.

45. For the foregoing reasons the complaint is dismissed.

0842-81-R Labourers' International Union of North America, Local 183, Applicant, v. **Fantin Bros. Carpentry Limited**, Respondent, v. **United Brotherhood of Carpenters and Joiners of America Local 1190**, Intervener

Evidence – Practice and Procedure – Witness – Witness on subpoena from applicant failing to appear – Whether Board seeking bench warrant on own initiative – Whether statements made before another panel admissible as statements against interest

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

APPEARANCES: *C. M. Mitchell, L. Steinberg and C. De Toni for the applicant; no one appearing for the respondent; Harold F. Caley and Ken Weller for the intervener.*

DECISION OF THE BOARD; January 29, 1982

1. At the commencement of the hearing in this matter on January 27, 1982, the Board referred to a letter dated January 26, 1982 to the Registrar from counsel for the respondent. This letter advised the Board that counsel had endeavoured to obtain an adjournment from counsel for the applicant and that this request had been refused. Counsel for the respondent advised the Board that he had been instructed to not attend the hearing on January 27, 1982, and in deference to the Board had written to advise of his instruction. In the course of hearing the representations from counsel for the applicant and the respondent, it appeared to the Board that the instructions of counsel for the respondent were directly related to his inability to secure the consent of the applicant for an adjournment of the hearing on January 27, 1982. It also appeared to the Board that the refusal of counsel for the applicant to consent to the

adjournment was directly related to the inability of counsel for the applicant to discover the precise reason for Mauro Angeloni's inability to appear as a witness before the Board on January 27, 1982, in response to a subpoena which had been served on Mr. Angeloni at the instigation of the applicant. The Board notes that the intervener had agreed to the request for an adjournment. At the hearing, counsel for the intervener expressed concern for the existing state of affairs but did not seek an adjournment of this hearing.

2. Counsel for the respondent did not address any request to the Board for an adjournment and the Board ruled that based upon the representations before it there was no basis for an adjournment and that the Board would proceed with the hearing.

3. During the hearing, counsel for the applicant sought to have the Board admit certain statements, which had allegedly been made by Mr. Angeloni before the Board on August 14, 1981, in evidence by the Board as constituting admissions against interest with respect to certain employers. This request was opposed by counsel for the intervener.

4. The Board ruled during the hearing that counsel for the applicant had alleged that certain admissions against interest were made by Mr. Angeloni as a representative or counsel of certain employers. These remarks which were attributed to Mr. Angeloni were made in the context of a request for an adjournment. Counsel for the intervener did not agree with the remarks which were allegedly made by Mr. Angeloni and adopted the position that in any event such alleged admissions against interest were not binding on the intervener. The Board noted that the alleged remarks were made before a differently constituted panel of the Board, were not made under oath and were made in the context of a request for an adjournment. The Board announced that it would assume, for the purposes of argument, that the remarks attributed to Mr. Angeloni were made. In our view, these remarks were not made as admissions against interests. Even if the Board regarded the alleged remarks of Mr. Angeloni as admissions against interest, the fact that such admissions did not bind the intervener meant that the admission of such evidence would have a prejudicial value which would exceed its probative value. The Board informed counsel for the applicant that it was not prepared to permit the applicant to adduce evidence with respect to Mr. Angeloni's alleged remarks.

5. The applicant produced evidence before the Board that Mauro Angeloni and Primo Fantin had each been served with subpoenas to appear before the Board on January 27, 1982, and give evidence under oath touching the matters in question in these proceedings and to bring certain material with them. The Board finds that Mauro Angeloni and Primo Fantin did not appear before the Board on January 27, 1982.

6. Counsel for the applicant asked the Board to certify to a judge of the Supreme Court the facts relied on to establish that the presence of Mauro Angeloni and Primo Fantin is required to the ends of justice under section 12(5) of the *Statutory Powers Procedure Act*, R.S.O. 1980, c. 484, in order that a bench warrant might issue under section 12(3) of that Act.

7. The Board is entitled on its own motion to seek a bench warrant under section 12(3) of the *Statutory Powers Procedure Act* and to make the necessary certification under section 12(5) of the said Act. As the Board noted in *Master Insulation Company Limited*, [1979] OLRB Rep. Mar. 237 at 239, the Board is entitled of its own motion to make applications under the relevant provisions of that Act. However, in that case, the Board concluded that it ought not to enter into the arena as a litigant and that the process before the Board would be

better served if the applicant took the responsibility for enforcing the subpoena. There is nothing in this application for certification which is before the Board which causes the Board to disagree with its earlier decision. The Board, in all the circumstances, is prepared neither to make applications under the *Statutory Powers Procedure Act* nor to make the certification referred to in section 12(5) of that Act. Counsel for the applicant informed the Board that in the event that the Board was not prepared to make applications under that Act, the applicant would make the applications.

8. The Board notes that the sufficiency and extent of the affidavits was not raised before it and the Board therefore expresses no opinion on such matters. The applicant is directed to inform the Registrar at such time when it is ready and able to continue with the hearing of this matter.

0868-81-R United Brotherhood of Carpenters and Joiner of America, Local 1190, Applicant, v. Fernway Construction Corp., Respondent, v. Group of Employees, Objectors

Membership Evidence – Petition – Whether membership evidence obtained though misinformation – No evidence that union misled as to what was being signed – Fact that employees confused as to effect of signing application for membership not affecting validity – Whether petition tainted by employer support

BEFORE: Ian Springate, Vice-Chairman, and Board Members L. Hemsworth and A. Hershkovitz.

APPEARANCES: *David McKee and Onilio Zanin for the applicant; Alan D. Direnfeld for the respondent; Eamonn Quarney and S. Shmihelsky for the objectors.*

DECISION OF THE BOARD; January 19, 1982

1. This is an application for certification filed pursuant to the construction industry provisions of the *Labour Relations Act*.

• • •

3. This matter originally came before a differently constituted panel of the Board which, without holding a hearing, certified the applicant on August 4, 1981 as the bargaining agent for certain employees of the respondent. The respondent subsequently advised the Board that it had not received notice of the application. The Board, after holding a hearing into the matter, accepted this contention, and on October 27, 1981 it revoked the certificate which had been issued to the applicant. The matter then came on for a hearing before this panel of the Board which dealt with the application *de novo*.

4. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

5. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act*.

6. The Board further finds that this application for certification does not relate to the industrial, commercial and institutional sector of the construction industry referred to in section 117(e) of the *Labour Relations Act*.

7. The Board further finds that all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

8. The respondent filed a list of employees in the bargaining unit as of the application date which contains the names of two individuals. The applicant filed evidence of membership on behalf of both of these individuals. The applicant also filed evidence of membership on behalf of twelve other persons. The respondent's position is that these twelve other persons were not employed in the bargaining unit at the relevant time that they were either independent contractors or not employed as carpenters or carpenters' apprentices. At the hearing the applicant indicated that it was prepared to have the application dealt with on the basis that the respondent's list of employees was correct.

9. The evidence of membership filed by the applicant takes the form of completed sections 1 and 2 of the following document. In every case, section 2 acknowledges the payment of \$1.00 to the union. The third section is meant to be given to an employee as a receipt for money payment:



No 5252

APPLICATION FOR MEMBERSHIP

Local Date
 United Brotherhood of
 Carpenters and Joiners of America

SECTION 1

Name

I,, hereby
 apply for membership in the above-named Local Union of the United
 Brotherhood of Carpenters and Joiners of America ("the Union") and
 hereby of my own free will and accord, authorize the Union or its designate
 to act for me as collective bargaining agent in all matters pertaining to
 rates of wages, hours of work and other conditions of employment.

SIGNATURE OF APPLICANT

SECTION 2

I hereby certify that the amount shown below was paid by me to be applied to initiation fees or monthly dues of the Union, and as evidence of good faith in my application for membership.

Amount /100 Dollars

Signature of Applicant

SIGNATURE OF RECEIVER

OF ABOVE MONEY

UNION-BLVD 35

APPLICANT'S RECEIPT

No 5252

Local

United Brotherhood of Carpenters and Joiners of America.

SECTION 3

Date Amount Paid \$

..... /100 Dollars

Address

Date of Birth Phone No.

Employed by

Signature of Receiver

10. The respondent challenged the acceptability of the membership evidence filed by the applicant on the grounds that it had been obtained through the use of false statements made to the employees. To this end, the respondent called as witnesses Mr. Eamonn Quarney, who is one of the two employees included on the list of employees and Mr. S. Shmihelsky, a person who signed a card but whom the respondent contended was not at the relevant time an employee in the bargaining unit. The person who acted as the collector of the monetary payment from these two persons acted as the collector for only one other person, an individual who also was not included on the list of employees. It should be noted that the collector was not at the hearing. The applicant contended that the lack of particulars in the respondent's allegations had made it difficult for it to determine prior to the hearing which collector was covered by the respondent's allegations relating to the use of false statements and, indeed, on this basis the applicant sought to have the Board decline to hear any evidence in support of the allegations. The Board, however, ruled that it would hear the respondent's evidence, but that the applicant could request an adjournment at the end of the respondent's case so as to give it an opportunity to call the collector. At the end of the respondent's case, the applicant decided not to request an adjournment, and in consequence the collector was not called as a witness.

11. In his examination-in-chief, Mr. Quarney testified that in signing the application for membership and the attached receipt, and paying \$1.00 to the union, he did not feel that he was thereby becoming a member of the union, only that he would be receiving more information about the union. Asked why he had reached this conclusion, Mr. Quarney replied that the collector had said that he would be hearing from the union. Mr. Quarney added that he had tried once before to join the applicant trade union, but at that time was told he needed "papers" (presumably tradesman's qualification papers) and \$200.00, and accordingly he felt

that \$1.00 was not sufficient to become a member. Although in his examination-in-chief Mr. Quarney testified that he had not read the application for membership totally before signing it, in cross-examination he acknowledged that prior to signing the document he had read the heading "application for membership" and had also read the second section which certifies the payment of money "as evidence of good faith in my application for membership". Mr. Quarney also agreed that he had been given the third section headed up "applicant's receipt". In cross-examination, Mr. Quarney acknowledged that at the relevant time he knew that he was signing an application for membership, but added that to his knowledge that did not amount to actual membership in the union. When asked by counsel for the applicant what he felt he had been applying for, Mr. Quarney replied, "membership if the union came in". It should be noted that at one point Mr. Quarney testified that the collector stated he needed signatures "to bring in the union".

12. There are situations in which the Board will refuse to give any weight to an application for membership signed by an employee, such as when the employee has been threatened or coerced into signing the document. See: *Chemtrusion Inc.*, [1979] OLRB Rep. Dec. 1150. In the instant case, however, it appears that Mr. Quarney signed the application for membership voluntarily. Further, on the basis of Mr. Quarney's own testimony, there is nothing to indicate that the representative of the union sought to mislead Mr. Quarney about what it was he was signing. Mr. Quarney knew it was an application for membership. Where the confusion seems to have arisen is with respect to the effect of an application for membership. In certain trade unions, the signing of an application for membership is but the first step in satisfying the requirements for membership under the union's constitution. However, for the purposes of the *Labour Relations Act*, section 1(1)(1) of the Act defines a member of a trade union as including a person who has applied for membership in the union and has paid at least \$1.00 to the union in respect of initiation fees or monthly dues.

13. Mr. Shmihelsky testified that the collector advised him that he was merely applying for an application form on which he could apply for union membership, as opposed to applying for membership itself. Mr. Shmihelsky added that he also felt that this was the case in that at one point he had joined the Canadian Paperworkers Union, which required that he both fill in a lengthy form and also be sworn into membership. For the purpose of these proceedings, we are prepared to assume that no weight should be given to Mr. Shmihelsky's card. However, Mr. Shmihelsky's name was not included on the list of bargaining unit employees, and Mr. Shmihelsky himself took the position that he was not employed as a carpenter. Accordingly, the setting aside of Mr. Shmihelsky's card cannot effect the fact that both of the employees on the respondent's list of employees had signed an application for membership in the applicant trade union.

14. As already indicated, section 1(1)(1) of the Act defines a "member" of a trade union for the purposes of the Act as a person who has applied for membership in the union and has paid to the union at least one dollar on account of initiation fees or monthly dues. Having regard to the material before us, the Board finds that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on November 10, 1981, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

15. Three statements of desire were filed in opposition to the application for certifica-

tion. Two of these were signed by individuals not included on the respondent's list of employees, and accordingly cannot affect the outcome of the application. (It should be noted that both of the individual's involved claimed in their statements that they were not employees in the bargaining unit.) The third statement of desire was signed by Mr. Quarney. If the Board were to accept this statement of desire as a voluntary expression of Mr. Quarney's views, the Board would likely follow its normal practice and exercise its discretion under section 7(2) of the Act to direct the taking of a representation vote.

16. Before the Board will give effect to a statement of desire, it must be satisfied that the statement is free from the actual, or perceived, influence of management. Often, as in the present case, a statement of desire will be signed by an employee who has indicated his support for the union only a short time before; and while an employee can be reasonably assured that his support for the union will not be communicated to his employer, he may have no such assurance concerning his refusal to sign a statement opposing the union. An employee may sign a statement because he fears that a refusal to do so will expose his support for the union and will be made known to his employer. Similarly, an employee may be motivated to sign a statement because of employer conduct subsequent to his joining the union which suggests that continued support for the union will result in the loss of his job, or other adverse employment consequences. In neither case can one regard his signing the statement as truly voluntary because in both cases, it results from a perceived threat to his job security. On the other hand, a union supporter may well have reconsidered his position in response to the arguments of his peers, or because of his own reassessment of the relative benefits of collective bargaining. There may be no employer misconduct and no perceived threat to job security. It is for this reason that the Board undertakes the inquiry contemplated by Rule 48(5) in order to satisfy itself from the circumstances of the origination, preparation and circulation of the statement, that the document truly represents the voluntary wishes of the employees who signed it. In the *Radio Shack* case, [1978] OLRB Rep. Nov. 1043, the Board discussed the nature of this inquiry in a long passage to which we might usefully refer:

"The Board has long held that there is an onus on a party relying on a statement of desire in opposition to an application for certification to establish that the 'sudden change of heart' by those who have signed for the union and shortly thereafter repudiated the union, represents a voluntary change of heart. The Board recognizes the delicate and responsive nature of the employer-employee relationship and having regard to it, is circumspect in its assessment of the voluntariness of any statement of desire which bears the signatures of employees who have also signed cards in support of the union. The Board's approach to these matters is described in the leading *Pigott Motors* case, 63 CLLC ¶ 16,264 in the following terms:

'In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interest and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free

exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories.'

Having regard to the sensitive nature of the employer-employee relationship, the Board has consistently held that it must be governed by the overall environment in the work place in deciding whether or not the statement of desire represents a voluntary expression of those who signed it. If the evidence establishes that the hand of management has been actively involved in its origination, preparation or circulation, the Board will dismiss the statement. The Board will also, however, dismiss the statement if the evidence establishes that an employee might reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of his decision to sign it or not to sign it. (See *Morgan Adhesives of Canada Ltd. and Canadian Paperworkers Union* [1975] OLRB Rep. Nov. 813 and the cases cited therein.)"

Similar views were expressed in *Valley Bottling of Canada Ltd.*, [1978] OLRB Rep. Aug. 784 where the Board put it this way:

"The Board has held in numerous decisions that a natural suspicion attaches to a statement of desire which follows on the heels of a union organizing campaign. The Board must assure itself that employees who have first indicated support for a trade union and then indicate a desire to withdraw that support have undergone this change of mind by their free choice; that is, free of overt or subtle influences issuing from the employer against the union. The Board, in assuring the rights of employees under the Act to select or reject a trade union as bargaining agent, recognizes the opportunity that employee's dependence on the employer for their job security gives the employer to unduly influence their freedom of choice, intentionally or unintentionally."

17. In the instant case, Mr. Quarney testified that after the initial certification, he was advised by Mr. Peter Ulcar, who he described as the respondent's Vice-President and "top man" on the job site, that Mr. Ulcar did not want the union and that he wanted to keep the union out. According to Mr. Quarney, Mr. Ulcar asked him if he wanted the union representing him, and since Mr. Quarney had not heard from the union subsequent to his having signed an application for membership he replied that he did not. Mr. Quarney and Mr. Ulcar later discussed having Mr. Quarney file a statement of desire in opposition to the application. Mr. Ulcar offered to deliver such a statement to the Board. Mr. Quarney then wrote out his statement of desire and gave it to Mr. Ulcar, who forwarded it to the Board. It is interesting to note that Mr. Ulcar later completed the respondent's reply to the application in which he made the following comment:

Of the seven persons employed by the Respondent, only two of these

employees performed work that would qualify them for inclusion in the bargaining unit. Of these two, one could not be contacted prior to the terminal date herein, however, the second has submitted to The Labour Relations Board, his statement to the effect that at no time did he desire to be represented by the Applicant.

18. We are satisfied from Mr. Quarney's testimony that he made the decision to oppose the application for certification only after Mr. Ulcar had made it clear that he was opposed to the trade union and wanted to keep the trade union out. Further, when he wrote out the statement of desire, Mr. Quarney did so on the understanding that it would be given to Mr. Ulcar, as indeed it was. In these circumstances, we are unable to accept the document as being the result of a voluntary change of heart on the part of Mr. Quarney, free from any managerial influence or involvement. Accordingly, the Board declines to order a representation vote on the basis of the statement of desire.

19. A certificate will issue to the applicant.

1740-81-R Local Union 2228, International Brotherhood of Electrical Workers, Applicant, v. Filtran Limited, Respondent, v. Group of Employees, Objectors.

Practice and Procedure – Unfair Labour Practice – Board recessing on second day of hearing to afford settlement discussions – Issuing remedial order in accordance with minutes of settlement

BEFORE: R. D. Howe, Vice-Chairman, and Board Members W. H. Wightman and S. Cooke.

APPEARANCES: *L. A. Roine, P. Jollymore, J. Huston and G. Myers for the applicant; Lynn H. Harden, Russell Zinn, Philip W. White, Milan Oppelt and Ian Bolt for the respondent; Garry Roberge, Garry O'Bomsawin, Margaritte Crawford and Helen Coughlar for the objectors.*

DECISION OF THE BOARD; January 6, 1982

1. This is an application for certification in which the applicant sought to be certified without a representation vote pursuant to section 8 of the *Labour Relations Act* as a result of a number of alleged contraventions of the Act by the respondent. The applicant also sought relief under section 89 of the Act.

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3. This application came on for hearing before the Board in Ottawa on December 15 and 16, 1981, along with a related section 89 complaint. During the second day of hearing, the proceedings were recessed to afford the parties an opportunity to engage in settlement discussions. Prior to the continuation of hearing scheduled in this matter, the parties filed with

the Board Minutes of Settlement with respect to this application. The terms of the Minutes of Settlement are as follows:

“The parties to the above-noted proceedings hereby agree to the following terms of settlement:

1. The Respondent acknowledges that the Applicant is a trade union within the meaning of the *Labour Relations Act*.
2. The Respondent agrees to provide reasonable access by the officials of the Applicant to the grounds surrounding the Respondent's plant for the purpose of conducting legal organizational activities, such access to continue until forty-eight (48) hours preceding a representation vote ordered by the Ontario Labour Relations Board.
3. The Respondent agrees to permit access to its plant at 229 Colonnade Road, Nepean by two representatives of the Applicant, with reasonable notice beforehand, for the purpose of conducting three (3) separate meeting with the employees of the Respondent out of the presence of any members of management. The meetings will take place during the regular working hours of the employees working on the day shift and will be open to employees of the Respondent working on the evening and night shifts. Attendance at the meetings will be without loss of pay on the part of the employees. The initial meeting will be forty-five (45) minutes in duration and the two subsequent meetings will be thirty (30) minutes in duration.
4. The Respondent will make available to the firm of Blaney, Pasternak a list of its non-managerial employees in the bargaining unit including their current address as indicated on the Respondent's personnel files and will keep the said list up to date until March 21, 1982. The firm of Blaney, Pasternak will, if directed by the Applicant, mail literature to each employee at his or her personal residence. Such literature shall include a tear sheet indicating that the employee may advise that he or she will not authorize release of his or her address to the Applicant. The tear sheet must be returned to the firm of Blaney, Pasternak within fifteen (15) days of the date of the mailing of the literature in order to prevent release of the employee's address. A copy of the tear sheet which is sent to the employees will be forwarded to the Respondent.
5. The Employees Association of Filtran Limited will be disbanded. Representative of the Association will be entitled to send a notice to employees of the Respondent within fifteen (15) days of the Board's decision herein indicating the reasons for their decision to disband the Association after agreement by the Applicant and Respondent to the wording thereof.
6. The parties consent to the issuance by the Ontario Labour Relations Board of a direction that a representation vote be conducted among the

employees of the Respondent as set out in the description of the bargaining unit proposed by the Applicant. The vote will be conducted in accordance with the normal practices of the Board and will occur on March 31, 1982 or April 7, 1982 or such other time as the Board directs after March 31, 1982. Those eligible to vote will be the employees of the Respondent as of March 21, 1982 who are covered by the description of the bargaining unit referred to above save and except those who voluntarily terminate their employment or who are discharged for cause between March 21, 1982 and the date of the vote.

7. The parties consent to the issuance by the Ontario Labour Relations Board of a direction that the Respondent post a notice in the form attached hereto as Appendix 'A' on all bulletin boards in its plant for a period of sixty (60) working days following the receipt by it of the Board's decision herein.

8. The parties agree that the bargaining unit is that set out in the Application for Certification filed by the Applicant.

"Philip White"
for FILTRAN LIMITED

"G. Myers"
for LOCAL UNION 2228

"Gary Roberge"
for Employees' Association"

"APPENDIX 'A' NOTICE TO EMPLOYEES

Posted pursuant to the provisions of the Labour Relations Act of Ontario:

We have issued this notice following a hearing before the Ontario Labour Relations Board and as a result of an agreement between ourselves and Local 2228, International Brotherhood of Electrical Workers. We wish to inform all employees of the following rights under the Act:

To organize themselves;

To form, Join or Help Unions;

To Bargain as a Group, through a Representative of their own choice;

To act together for collective bargaining;

To refuse to do any and all of the above things;

We assure our employees that:

We will not take any action against employees because of their support for Local 2228, International Brotherhood of Electrical Workers.

If Local 2228, International Brotherhood of Electrical Workers is certified by the Ontario Labour Relations Board following a vote of the employees, we will bargain in good faith with the Union and make every reasonable attempt to make a Collective Agreement.

We would also inform you that the complaint which was filed by Gail Catherine Wegman following the termination of her employment has been settled to the satisfaction of Mrs. Wegman and the company on terms on terms which include the payment of compensation to Mrs. Wegman.

The Union will have three (3) opportunities to speak to the employees during working hours fuller details of which will be posted on the bulletin board.

Representatives of the Union shall have reasonable access to the company's grounds surrounding the plant for the purpose of disseminating information.

FILTRAN LIMITED

This is an official notice of the Board and must not be removed or defaced."

4. Having regard to the agreement of the parties and the evidence adduced before us in this matter, the Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
5. Having further regard to the agreement of the parties, the Board finds that all employees of the respondent at Ottawa, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.
6. Having regard to the agreement of the parties, the Board directs that a representation vote be taken of the employees of the respondent in the bargaining unit. The vote is to be taken on March 31, 1982, April 7, 1982, or on such other date after March 30, 1982 as may be determined by the Registrar pursuant to Rule 43 of the Board's Rules of Procedure. All employees of the respondent in the bargaining unit on March 21, 1982, who do not voluntarily terminate their employment or who are not discharged for cause between March 21, 1982 and the date the vote is taken will be eligible to vote. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.
7. Having further regard to the agreement of the parties, the Board directs the

respondent to comply with the terms of the Minutes of Settlement set forth above, including the posting of the attached notice marked "Appendix". the Board directs that the respondent post copies of that notice, after being duly signed by the respondent's representative, on all bulletin boards in its plant and that the respondent keep the notices posted for sixty consecutive working days. Reasonable steps shall be taken by the respondent to ensure that the said notices are not altered, defaced or covered by any other material. Reasonable physical access to the premises shall be given by the respondent to a representative of the complainant so that the complainant can satisfy itself that this posting requirement is being complied with.

8. This matter is referred to the Registrar.
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The Labour Relations Act

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NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE ISSUED THIS NOTICE FOLLOWING A HEARING BEFORE THE ONTARIO LABOUR RELATIONS BOARD AND AS A RESULT OF AN AGREEMENT BETWEEN OURSELVES AND LOCAL 2228, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS. WE WISH TO INFORM ALL EMPLOYEES OF THE FOLLOWING RIGHTS UNDER THE ACT:

- TO ORGANIZE THEMSELVES,
- TO FORM, JOIN OR HELP UNIONS,
- TO BARGAIN AS A GROUP, THROUGH A REPRESENTATIVE OF THEIR OWN CHOICE;
- TO ACT TOGETHER FOR COLLECTIVE BARGAINING,
- TO REFUSE TO DO ANY AND ALL OF THE ABOVE THINGS,

WE ASSURE OUR EMPLOYEES THAT:

WE WILL NOT TAKE ANY ACTION AGAINST EMPLOYEES BECAUSE OF THEIR SUPPORT FOR LOCAL 2228, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS.

IF LOCAL 2228, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS IS CERTIFIED BY THE ONTARIO LABOUR RELATIONS BOARD FOLLOWING A VOTE OF THE EMPLOYEES, WE WILL BARGAIN IN GOOD FAITH WITH THE UNION AND MAKE EVERY REASONABLE ATTEMPT TO MAKE A COLLECTIVE AGREEMENT.

WE WOULD ALSO INFORM YOU THAT THE COMPLAINT WHICH WAS FILED BY GAIL CATHERINE WEGMAN FOLLOWING THE TERMINATION OF HER EMPLOYMENT HAS BEEN SETTLED TO THE SATISFACTION OF MRS. WEGMAN AND THE COMPANY ON TERMS WHICH INCLUDE THE PAYMENT OF COMPENSATION TO MRS. WEGMAN.

THE UNION WILL HAVE THREE (3) OPPORTUNITIES TO SPEAK TO THE EMPLOYEES DURING WORKING HOURS FULLER DETAILS OF WHICH WILL BE POSTED ON THE BULLETIN BOARD.

REPRESENTATIVES OF THE UNION SHALL HAVE REASONABLE ACCESS TO THE COMPANY'S GROUNDS SURROUNDING THE PLANT FOR THE PURPOSE OF DISSEMINATING INFORMATION.

FILTRAN LIMITED
PER: (AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

2013-81-U Ontario Public Service Employees Union, Complainant, v. G. Wragg, T. Norton, and Humber College of Applied Arts and Technology, Respondents.

Arbitration – *Colleges Collective Bargaining Act* – Unfair Labour Practice – Allegation of of unfair labour practices under *Colleges Collective Bargaining Act* – Whether Board deferring to arbitration – Board applying same principles as to deferral as under *Labour Relations Act*.

BEFORE: R. D. Howe, Vice-Chairman, and Board Members F. W. Murray and H. Kobryn.

APPEARANCES: *W. A. Lokay, Grant W. Bruce and Joe Grogan for the complainant; Donald F. O. Hersey and Tom Norton for the respondents.*

DECISION OF THE BOARD; January 18, 1982

1. This is a complaint under section 78 of the *Colleges Collective Bargaining Act* in which it is alleged that the grievor, Joseph C. Grogan, has been dealt with by the respondents contrary to the provisions of section 76 of the Act.

2. Counsel for the respondents raised several preliminary matters with respect to this complaint. After hearing and considering the submissions of the parties with respect to those matters, the Board made the following oral ruling, which is hereby confirmed:

“The principles applied by the Board in determining when it will defer to grievance arbitration were thoroughly canvassed by the Board in *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254. Although that case involved a complaint under what is now section 89 of the *Labour Relations Act*, we are of the view that similar principles apply to complaints under section 78 of the *Colleges Collective Bargaining Act*. Assuming without deciding that the allegations contained in the present complaint would, if proved, constitute a violation of section 76 of the *Colleges Collective Bargaining Act*, we are nevertheless of the view that this is an appropriate case for the Board to defer to the grievance arbitration proceedings that have already been set in motion by the complainant. A relatively mature collective bargaining relationship clearly exists between the parties and it appears to us that the matters in dispute between the parties are primarily contractual in nature. It also appears that the resolution of the contractual issues is congruent with the resolution of this unfair labour practice complaint. Therefore, having regard to all of the circumstances, the Board will defer to the arbitration process under the collective agreement that is binding upon the parties to this complaint. However, in accordance with our normal practice, the Board will retain jurisdiction with respect to this complaint to ensure that the dispute over the interpretation and application of the collective agreement is resolved with reasonable promptness, that the arbitration procedures have been fair, and that the outcome of the arbitration is neither repugnant to the purposes of the *Colleges Collective Bargaining Act* nor remedially inadequate. Accordingly, this complaint is hereby adjourned *sine die* for a period not exceeding one year. Unless within that time either party requests that the

Board schedule the matter for further hearing, the Board will deem it to have been withdrawn and the Board's record will be endorsed accordingly without further notice to the parties."

**1883-81-U International Ladies Garment Workers' Union,
Complainant, v. Josh Industries Incorporated, Respondent.**

Practice and Procedure – Unfair Labour Practice – Complaint of bad faith bargaining against employer – Union filing separate application for declaration of sale – Remedy sought having ramifications for purchaser employer – Board adjourning to give notice to purchaser of unfair labour practice hearing

BEFORE; R. O. MacDowell, Vice-Chairman and Board Members J. A. Ronson and H. Kobryn.

APPEARANCES: *S.B.D. Wahl and Wm. Villano for the complainant; no one appearing for the respondent; Robert Harlang for Richter and Partners the Receiver for the respondent.*

DECISION OF THE BOARD; January 19, 1982

1. This is a complaint filed under section 89 of the *Labour Relations Act* alleging that the respondent Josh Industries Incorporated ("Josh"), has contravened section 15 of the Act. That section reads as follows:

The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement."

2. The complainant union is the bargaining agent for Josh's employees and in the fall of 1981 was bargaining with Josh in an effort to conclude a collective agreement. The union contends that by October 18, 1981 the parties had reached agreement on all matters remaining in dispute between them, and that they were fully *ad idem* with respect to the terms of a collective agreement. Thereafter, the union contends, the respondent resiled from that agreement and refused to sign it. The union argues that this conduct by Josh constitutes a breach of section 15 of the Act, and requests that the Board direct Josh to execute a collective agreement on the terms previously agreed, or, in the alternative, to direct Josh to bargain about the duration clause in the agreement — which is the only item which, in the union's submission, could possibly be regarded as outstanding. The union further seeks damages against the respondent along the lines set out in *Radio Shack* [1979] OLRB Rep. Dec. 1220. In summary therefore, the complainant's position is that:

- (a) There was an agreement on or about October 18, 1981, and the Board should order that this agreement be transformed into a collective agreement within the meaning of the Act; or

- (b) there was an agreement save for the duration clause and the Board should direct the resumption of bargaining solely on this issue and,
- (c) the respondent should compensate the union for any “thrown away” negotiating expenditures, and should compensate the employees in the bargaining unit for any losses which have been occasioned by the respondent’s failure to execute a collective agreement.

3. In view of the *Radio Shack* decision, there is nothing particularly novel about the complainant union’s position, but shortly after the alleged contravention of the Act, the management of Josh lost control of that company’s destiny. In mid-November, 1981 a receiver was appointed in connection with a debt instrument to one of Josh’s creditors, and on December 17, 1981 the same receiver was appointed in respect of an outstanding liability to the Federal Business Development Bank. This receiver, Richer and Partners, (“Richter”), has managed the affairs of the respondent since that time. Richter had effective control of the enterprise at the time this matter came on for a hearing.

4. Robert Harlang, a representative of Richter, appeared at the hearing and told the Board that his firm had been in control of the respondent’s operation since mid-November, 1981 and had already disposed of much of the respondent’s inventory. However, the main transaction concerning the respondent’s property involves a transfer of its machinery and equipment, and a related transfer of the lease to its premises to the Davis Textile Company Limited (“Davis”). This series of related transactions is expected to close the week of January 4th — that is within a day or two of the commencement of the Board’s hearing into the union’s unfair labour practice complaint. The union advised the Board that it had filed a section 63 application alleging that Davis is a “successor employer” to the respondent. Davis has had no notice of the unfair labour practice proceedings, nor at the time of the hearing, did it have any notice of the successor rights application.

5. The remedy sought by the union in this case could well have ramifications for Davis, if, as the union contends, Davis is the successor of Josh. This of course depends upon what remedial order, if any, the Board makes if a statutory violation is proved, and what aspects of that order, if any, could be said to “flow through” to a successor employer by virtue of section 63. It may be that Davis has merely a “commercial or incidental” interest in the outcome of the unfair labour practice proceeding, so that, although it is economically affected, its contingent interest gives it no legal right to intervene (see: *Napev Construction Limited* [1976] OLRB Rep. Mar. 109; application for judicial review dismissed *sub nomine*; *Bricklayers Masons Independent Union of Canada Local 1 v. Ontario Labour Relations Board*, Ontario Divisional Court decision released May 24, 1977 — unreported.) On the other hand, since Davis has had no notice of this proceeding, and has had no opportunity to address the matter of its status, the Board is reluctant to make any determination in this regard without at least extending it an opportunity to be heard. Since the business is not currently operating, and since the section 63 application can be brought on expeditiously (i.e. within two or three weeks), it appears to the Board that there would be no prejudice to the complainant arising from an adjournment so that Davis can be served with notice of both the successor rights and unfair labour practice applications. When the two matters are brought on together, and all the potentially interested parties are present, the Board can then determine whether the issues are severable, whether the matters should be consolidated, and whether Davis has the status to intervene in the unfair labour practice complaint.

6. The union seeks its costs with respect to that part of the day “wasted” because Davis was not given notice. The Board does not award “costs” except in extraordinary situations, and in all of the circumstances, including the ambiguity of Davis’ position, we do not think an award of costs is appropriate here.

7. The matter is referred to the Registrar.

**1584-81-U Service Employees’ International Union, Local 204,
Complainant, v. K-Mart Canada Limited, Respondent.**

**Change of Working Conditions – Discharge for Union Activity – Unfair Labour Practice –
Whether grievor discharged because of seeking union’s assistance – Whether withdrawal of privilege to
work Saturdays contravening statutory freeze**

BEFORE: R. D. Howe, Vice-Chairman, and Board Members W. H. Wightman and W. F. Rutherford.

APPEARANCES: *C. M. Mithcell and A. Ferrens for the complainant; Robert MacDermid and C. A. Cumiskey for the respondent.*

DECISION OF THE BOARD; January 20, 1982

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complaint alleges that the grievor, Mark Lauber, has been dealt with by the respondent contrary to the provisions of sections 3, 64, 66 and 79 of the Act.

2. The complaint arises out of the termination of the grievor’s employment with the respondent on September 28, 1981. It is alleged that on or about that date the grievor was dealt with by Shirley Penny contrary to the provisions of section 3, 64, 66 and 79 of the Act in that Mrs. Penny did on her own behalf and on behalf of the respondent, discriminate against the grievor and refuse to continue to employ the grievor contrary to the provisions of the Act.

3. The sections of the *Labour Relations Act* upon which the complainant relies provide, in part, as follows:

“3. Every person is free to join a trade union of his own choice and to participate in its lawful activities.

64. No employer or employers’ organization and no person acting on behalf of an employer or an employers’ organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act; . . .

79(1) Where notice has been given under section 14 or section 53 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

- (a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,
 - (i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or
 - (ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board, as the case may be or

until the right of the trade union to represent the employees has been terminated, whichever occurs first”

Also relevant to this complaint is section 89(5) which provides:

“89(5) On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.”

4. In the *Barrie Examiner* case, [1975] OLRB Rep. Oct. 745, the Board stated:

“... the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts. First, that the reasons given for the discharge are the only reasons and, second, that these reasons

are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.”

It is not the function of the Board in cases of this type to decide whether or not the respondent had just cause to refuse to continue to employ the grievor, nor is the Board primarily concerned with the fairness or lack of fairness in the conduct of the respondent. Rather the Board’s concern is “whether the conduct of the employer was in any way tainted by anti-union motive” (see *Olympia & York Developments Limited*, [1978] OLRB Rep. Jan. 68, at paragraph 33). As indicated in *Fielding Lumber Company*, [1975] OLRB Rep. Sept. 665, at paragraph 10:

“... in assessing an employer’s declared motivation due regard may be had to the peculiarities of the context surrounding an employer’s actions. To the extent that peculiarities exist and cannot be reasonably explained an employer may fail, by a process of inferential reasoning, to satisfy the burden placed upon it.”

See also *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299, at paragraph 5, in which the Board stated:

“In cases such as these the Board is very often required to render a determination based on inferential reasoning. An employer does not normally incriminate himself and yet the real reason or reasons for the employer’s actions lie within his knowledge. The Board, therefore, in assessing the employer’s explanation must look to all of the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer’s knowledge of it, unusual or atypical conduct by the employer following upon his knowledge of trade union activity, previous anti union conduct and any other ‘peculiarities’ (see *National Automatic Vending Co. Ltd.* case 63 CLLC 16, 278)”

(See also *Alpha Laboratories Inc.*, [1981] OLRB July 823, and *Mount Forest Caskets Limited*, [1980] OLRB Rep. June 853.) One of the rights protected by the Act is the right of an employee to enlist the aid of a trade union which has been certified as his bargaining agent, in attempting to resolve employment problems that he encounters with his employer, such as scheduling problems (see *Bedard Girard Ontario*, [1981] OLRB Rep. Oct. 1338.

5. With respect to the alleged breach of the section 79 “statutory freeze”, the Board has stated in many cases that the purpose of section 79(1) is to preserve the status quo so as to provide a period of stability free from the disturbance of unilateral change during the sensitive period while the parties are entering into negotiations for a collective agreement. (See, for example, *Women’s College Hospital*, [1981] OLRB Rep. May 597, and *Corporation of the Town of Petrolia*, [1981] OLRB Rep. March 261.) As stated by the Board in *A.E.S. Data Limited*, [1979] OLRB Rep. May 368, at paragraph 10:

“The purpose of section 70 [now section 79] is to maintain the prior pattern of the employment relationship, in its entirety, while the parties are negotiating for a collective agreement. This ensures that they will

have a fixed basis from which to begin negotiations, and prevents unilateral alterations in the status quo which might give one party an unfair advantage either from the point of view of bargaining or of propaganda. The status quo includes not only the existing terms and conditions of employment but also any other established benefits which the employees are accustomed to receive, and which can therefore be considered to be 'privileges.' It is clear that express promises, or a consistent pattern of employer conduct, can give rise to such privileges and that they are caught by the statutory freeze. It should be noted, however, that section 70 also freezes the 'rights and privileges' *of the employer*. The section requires *both* parties to maintain the existing pattern of their relationship; that is, to conduct their business as before. In *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859, the Board discussed the effect of section 70 in the following way:

"The "business as before" approach does not mean that an employer cannot continue to manage its operation. What it does mean is, simply, that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred, providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of the employees by a trade union. The right to manage is maintained, qualified only by the condition that the operation be managed as before. Such a condition, in our view, cannot be regarded as unduly onerous in light of the fact that it is management which is in the best position to know whether it is in fact carrying out business as before. This is an approach, moreover, that cuts both ways, in some cases preserving an entrenched employer right and in other cases preserving an established employee benefit."

(See also *Madame Vanier Children's Services*' [1981] OLRB Rep. June 734, and *Humber Memorial Hospital*, [1979] OLRB Rep. Aug. 764.) As noted in *A.E.S. Data Limited*, *supra*, the "statutory freeze" under section 79 applies not only to rates of wages and other terms and conditions of employment but also to "privileges". The scope of that term was described as follows in *St. Mary's Hospital*, [1979] OLRB Rep. Aug. 795, at paragraph 10:

"Section 70(2) [now section 79(2)] preserves not only the employees' terms and conditions of employment, but also *privileges* which, by reason of custom and practice, have become a part of the employment relationship. The term 'privilege' is extremely broad and extends to all of those benefits which an employee is accustomed to receiving but to which he is not legally entitled, and which cannot, therefore, be considered a 'right.' In order to determine whether a particular benefit, or aspect of the employment relationship, has become a privilege, it is necessary to examine the circumstances of each particular case since privileges can arise from established custom, practice, or policy. The question is an evidentiary one for, by definition, the Board's consideration must be beyond the strictly legal incidents of the relationship ('rights') and include those aspects of the relationship which give rise to 'privileges.'"

Although that case dealt with the scope of the term “privileges” under section 79(2), similar considerations apply to that term in the context of section 79(1). (See also *Hotel Canadiana*, [1980] OLRB Rep. Aug. 1210, and *Scarborough Centenary Hospital Association*, [1979] OLRB Rep. July 693.) Moreover, a section 79 “privilege” may be personal to a particular employee. For example, in *Cloverleaf Hotel*, [1981] OLRB Rep. June 630, the Board found that an employer had contravened what is now section 79 by discharging for refusal to work on Saturdays an employee who enjoyed “a personal privilege absolving her from the normal requirement to work Saturday shifts”. An employer’s action need not be tainted by anti-union animus to constitute a violation of section 79; the effect of that section is to prohibit (during specified intervals) alteration of wages, any other term or condition of employment, or any right, privilege or duty of the employer, the trade union, or the employees, without any reference to the motivation of the parties (see *Wellesley Hospital*, [1976] OLRB Rep. July 364, at paragraph 9).

6. With those general principles in mind, the Board must now consider the facts of the present case. The grievor is a sixteen year old student who commenced employment with the respondent at its Bayview Village Shopping Centre (“Bayview Village”) store on July 8, 1980. That store is open from 10:00 a.m. to 10:00 p.m. from Monday to Friday and from 9:00 a.m. to 10:00 p.m. on Saturdays. The respondent uses full-time and part-time employees to cover those hours. The store employs approximately seventy-five part-time employees who generally work two nights a week and Saturdays, although some work only week-nights and a few work only Saturdays.

7. Prior to July of 1981 the grievor was employed by the respondent as a part-time employee. He worked in the stockroom from 6:00 to 10:00 on Monday and Thursday nights and was also called in to work on the occasional Saturday. During February of 1981 the grievor joined the complainant trade union and “spoke favourably to [his] fellow employees about the union”. Although he never asked anyone to sign a card, Mr. Lauber described himself as an “active” supporter of the complainant who attended all of its meetings and “openly admitted” his support to his fellow employees. Over seventy-five percent of the respondent’s Bayview Village employees joined the complainant trade union.

8. On February 20, 1981, the complainant applied for certification as bargaining agent for all employees of the respondent at Bayview Village (Board File No. 2494-80-R). That application came on for hearing before another panel of the Board on March 13, 1981. The respondent contended in those proceedings that the bargaining unit should not be confined to its employees at Bayview Village, as requested by the complainant trade union, but rather should include (subject to certain exclusions) all employees of the respondent employed at its K Mart stores in the Municipality of Metropolitan Toronto (including the Bayview Village store and three other stores). In a decision dated March 25, 1981 in that file, the Board outlined the dispute between the parties with respect to the geographic scope of the bargaining unit and ruled that it was prepared to hear “whatever additional evidence the respondent wishes to adduce in support of its position.” As indicated in paragraph 2 of the Board’s decision dated September 10, 1981 in that matter, a hearing scheduled for April 29, 1981 for the purpose of hearing such additional evidence was subsequently rescheduled to July 2, 1981 on the agreement of the parties. That hearing was subsequently cancelled at the request of counsel for the respondent who advised the Board that his client had instructed him not to call additional evidence and asked the Board to decide the issue of the appropriate geographical scope of the bargaining unit on the basis of the agreed to facts submitted by the parties at the original hearing held on March 13, 1981.

9. On July 2, 1981, Shirley Penny, the Personnel Supervisor at the respondent's Bayview Village store, complied with the grievor's request for a full-time summer position by giving him the position of full-time salesclerk in the stationery department, which position had become open as a result of a resignation. At that time, the grievor signed the following notation that was entered on his personnel card:

"July 2/81. Mark has accepted the full time position of sales clerk in the stationery dept for summer only. At the beginning of Sept. he will go back to part-time in stockroom or wherever needed. He will be on ABC shift schedule with 2 nights 1-10, 3 days 10-6, Tuesday off with every 3rd Sat. off."

10. The grievor anticipated that he would encounter a heavy school workload when he entered grade 12 in September of 1981. It was his evidence that he advised Mrs. Penny towards the end of August that he would like to work only on Saturdays when he returned to part-time employment in the fall, but that "he might be able to work a weeknight". He added that he "would have to wait until September when school started to make sure". Mrs. Penny, on the other hand, testified that the first time the grievor indicated that he wanted to work only on Saturdays was on September 9th or 11th.

11. At the grievor's request, his last day on a full-time schedule was September 2, 1981. He did not work at all from September 3rd to 11th inclusive as a result of his request to have those days off to afford him a brief vacation before he returned to school. Mrs. Penny could have worked the grievor into the stockroom schedule again or into a part-time (Thursday evening) position in the camera department in early September but did not do so because she was waiting to hear from the grievor concerning his availability.

12. By decision dated September 10, 1981, in Board File No. 2492-80-R, the Board, differently constituted, ruled that a single store bargaining unit was the appropriate unit for collective bargaining in that certification application and certified the complainant trade union as bargaining agent for full-time and part-time bargaining units of the respondent's employees at its Bayview Village Shopping Centre store. On September 6, 1981, the complainant served the respondent with notice to bargain in respect of each of those bargaining units.

13. On or about September 11th the grievor informed Mrs. Penny that "it would be very difficult if not impossible for [him] to work a weeknight" and that he would "much prefer to work Saturdays only". Mrs. Penny advised the grievor at that time that his limited availability "could be a problem" because she did not have any Saturday only schedules available. However, as she had not yet filled the full-time stationery department position that became open when the grievor left that position on September 2nd, Mrs. Penny permitted the grievor to work in the stationery department on Saturday September 12th. The grievor attended at Mrs. Penny's office again on Friday September 18th to see if she had any work for him for Saturdays only. She repeated that she did not have any schedule available for Saturdays only. However, she permitted him to work in the stationery department again the next day as she had not yet filled the full-time position in that department.

14. Between September 2nd and 24th, Mrs. Penny was actively looking for someone to fill the full-time vacancy in the stationery department. She interviewed several employees from

another store that was about to close and was led to believe that one of those employees would be starting work in the Bayview Village stationery department on September 24th. However, on September 23rd Mrs. Penny discovered that the employee in question was not available. Meanwhile, Mrs. Penny had received a telephone call from a former employee named Sharon Brewster who had worked for the respondent at Bayview Village during the previous summer. When Mrs. Penny discovered on September 23rd that the employee from the other store was not available to fill the full-time position in the stationery department, she telephoned Mrs. Brewster and arranged for her to assume that position effective September 28th.

15. Mrs. Penny next saw the grievor on September 25th when he again came in to ask her if she had a schedule for him for Saturdays only. She told him that she still did not have such a schedule but that she could use him in the stationery department on Saturday September 26th as her new full-time stationery department employee would not be starting until the 28th. She also made it clear to him that once the new full-time employee commenced work, she would not require his services in the stationery department on Saturdays and that she had no Saturday only schedule available. The grievor, who was rather upset about Mrs. Penny's failure to provide him with a Saturdays only schedule, "talked to a couple of employees in the store" about Mrs. Penny giving him what he described as "a squeeze play", by "making no effort to find [him] a job" and "hoping that [he] would go away". The grievor was subsequently advised that one of those employees had contacted Alan Ferrens, an official of the complainant who had assisted in organizing the respondent's Bayview Village store. The grievor was also informed that Mr. Ferrens had been in touch with the respondent concerning the grievor's scheduling difficulty.

16. The Manager of the respondent's Bayview Village store at the time of the events in question was Donald Smallwood. Mr. Smallwood testified (during cross-examination) that he was transferred on two days' notice in February of 1981 from the respondent's store in Stratford to the Bayview Village store "because they had a problem in the [Bayview Village] store — they had union activity there". On Monday September 28, 1981 at approximately 2:00 p.m., Mr. Smallwood received a telephone call from Vice-President C.A. Cumiskey. Mr. Cumiskey informed him that the complainant trade union had contacted Robert MacDermid, the respondent's counsel to ascertain why the grievor's "hours were cut off", and that Mr. MacDermid had, in turn, contacted Mr. Cumiskey. (The parties were in agreement that on the morning of September 28th, Mr. Ferrens, acting on information received not directly from the grievor but rather indirectly, telephoned Mr. MacDermid with respect to the grievor's problem with his hours. Mr. MacDermid subsequently contacted Mr. Cumiskey who, in turn, telephoned Mr. Smallwood.) After reviewing with Mrs. Penny the grievor's employment history, Mr. Smallwood telephoned Mr. Cumiskey and explained the situation. It was Mr. Smallwood's evidence that Mr. Cumiskey did not give him any instructions concerning "what had to be done with the grievor".

17. Later that afternoon the grievor attended at the store and spoke again with the two employees with whom he had previously discussed the difficulties that he was encountering in attempting to obtain a Saturdays only schedule. After informing him that one of them had contacted Mr. Ferrens who had in turn contacted the respondent concerning his problem, those employees told the grievor that they (the two employees) were of the opinion that he should get work because he had been working at the store for a long time. They also advised him to go to Mrs. Penny's office and ask for work. They suggested that if Mrs. Penny did not give him work, he should tell her that he would be coming in on Saturday to work and if she did

not like it she could speak to the union about it. In accordance with their advice, the grievor met with Mrs. Penny at approximately 4:30 p.m. There is some conflict in the evidence as to whether the grievor asked Mrs. Penny if she had any "Saturdays only" work for him (as Mrs. Penny stated in her evidence) or if she had "any work" for him (as the grievor testified). Whatever the grievor's actual words may have been, the Board is satisfied that Mrs. Penny interpreted the grievor's words as a request for a Saturdays only schedule. When Mrs. Penny replied that she did not have a schedule for him, the grievor became upset because he was of the opinion that she "was trying to give [him] a squeeze play because [he] had been a member of the union and had been standing up to her". He told her that he knew of a woman who, after taking the summer off to be with her children, had not been permitted to return to work at the store because she was not willing to work every Saturday and that he was upset because it appeared to him that Mrs. Penny had Saturday hours for people who did not want them but no Saturday hours for people who did. (Apparently the individual in question had worked in the "ladies wear" department for a number of years, an area in which the grievor had no expertise or experience apart from having "swept the floor in there on a Saturday".) The grievor also told Mrs. Penny that he felt that there was something illegal about the fact that he was "just being pushed out the door like this". Mrs. Penny responded that she had been in the business for ten years and knew what was legal and what was not. It was the grievor's evidence that he then stated, "I was told to tell you that I'm coming in on Saturday to work and if you don't like it you can call the union." He further testified that Mrs. Penny replied, "So you'll talk to the union will you?" to which he replied, "Yes", and left the office.

18. Mrs. Penny's evidence concerning what was said at that meeting differed somewhat from that of the grievor. According to her, the grievor told her: "I'm coming in to work on Saturday and you'd had better have some hours for me or I'll call the union", to which she replied that he could call whomever he wanted. She could not recall saying, "So you'll take it to the union will you?"

19. It is unnecessary for the Board to resolve this conflict in the evidence. Whatever the precise words spoken may have been, it is clear that the grievor's statement that he was coming in to work on Saturday, spoken in conjunction with a reference to the union, made Mrs. Penny very angry. She went directly to Mr. Smallwood's office and told him what had transpired. Mr. Smallwood told her that they should terminate the grievor immediately "because of his attitude" and "because the store did not have a schedule for Saturdays only".

20. Mrs. Penny then went to payroll to have the grievor's vacation pay cheque prepared and had the grievor paged. She then prepared and signed a notice of termination of the grievor's employment in which the only reason for termination specified was his "availability being restricted to Saturdays only". That document, which gave the grievor two weeks' notice of termination by making the termination of his services effective October 13, 1981, was also signed by Mr. Smallwood before it was given to the grievor by Mrs. Penny in her office about ten minutes after her initial meeting with the grievor that afternoon.

21. On September 28, 1981, Mrs. Penny also noted the grievor's termination on his personnel card. As in the case of the notice of termination, the only reason specified on his personnel card for the discontinuance of his employment was: "can't work other than Sats. No Sat only jobs open." However, it was Mrs. Penny's evidence that the grievor was terminated "because of his attitude and because he was only available on Saturdays". She was unable to provide any credible explanation for her failure to specify on the notice of termination and the

personnel card that the grievor's "attitude" was one of the reasons for his discharge. The significance of the events that occurred on September 28th in determining the respondent's true motivation for the discharge of the grievor is clearly demonstrated by the following testimony by Mr. Smallwood (in response to a question by Board Member Wightman): "If Mr. Lauber had not come in on that Monday (September 28th), I don't think that he would have been terminated on that Monday. It was what he said on Monday"

22. The respondent's witnesses gave contradictory evidence concerning when the decision to terminate the grievor was made. It was Mrs. Penny's evidence that during their discussion at approximately 2:00 p.m. on September 28th (following Mr. MacDermid's call) Mr. Smallwood suggested that they should terminate the grievor if they did not have hours for him. She further testified that she told Mr. Smallwood at that time that she agreed. Mr. Smallwood, who was excluded from the hearing room while Mrs. Penny testified, told the Board that the decision to terminate the grievor was not made before 4:30 that afternoon. There was also some inconsistency within Mr. Smallwood's evidence itself. During examination in chief Mr. Smallwood testified that although he told Mrs. Penny at approximately 2:30 p.m. on September 28th that they had to "make a decision" concerning the grievor since he "was on no schedule whatever as of September 2nd", no decision was made at that time. However, in cross-examination after being confronted with the consistency between his evidence and that of Mrs. Penny on this point, he testified that at approximately 2:30 p.m. that day, he and Mrs. Penny discussed that they "would have to terminate Mr. Lauber" but that "no time was put on it" until later that afternoon. However, he also told the Board in cross-examination: "Mrs. Penny and I talked over at 2:30 what we were going to do with Mr. Lauber. It was mentioned that we would have to do something with Mr. Lauber."

23. Only three of the respondent's part-time employees at Bayview Village have a Saturdays only schedule. One of them is a relatively long service part-time employee who advised Mrs. Penny in August of 1981 that he would be "going to Ryerson" in the fall and requested a Saturdays only position. He was given a Saturdays only part-time position that Mrs. Penny had open at that time in the pet and patio department. In August of 1981 a second long term part-time employee who was about to enter college requested and was granted a Saturdays only part-time position as a cashier. The third person with a Saturdays only schedule is a young lady who was hired as a summer student in July of 1981 to work on the checkouts as a cashier. During the last week of August or the first week of September she requested Saturday work and was offered a schedule that was available at that time for a part-time cashier "to work four hours on Saturday morning and afternoon". Although we do not doubt that the grievor honestly believed that Mrs. Penny should have been aware prior to September of his desire for Saturdays only work, having regard to all of the evidence the Board finds that Mrs. Penny was not in fact aware of such desire on his part until September 11th, at which time no Saturdays only schedule was available. Accordingly, the respondent did not contravene the Act by giving those three Saturdays only schedules to employees other than the grievor since the respondent was not aware of the grievor's desire for such a schedule at the time that they were given those schedules.

24. Although the grievor testified that he would have "considered" working a weeknight if an offer of such work had been made to him, having regard to all of the evidence the Board is satisfied that through his various conversations with Mrs. Penny in September, the grievor left her with the distinct impression that he was only available for work on Saturdays. Indeed, the grievor's testimony during cross-examination indicates that he did not offer to work during

the week because he was “quite sure that Saturday positions existed”. Accordingly, the Board does not find the failure of the respondent to offer the grievor a schedule involving weeknight work to be a contravention of the Act in the circumstances of this case.

25. In their evidence Mrs. Penny and Mr. Smallwood attempted to attach considerable importance to the fact that unlike the respondent’s other part-time employees, the grievor did not have a schedule of work. However, the fact that the grievor continued to be employed by the respondent from September 2nd to September 28th without such a schedule clearly indicates that the lack of a schedule of work would not inevitably lead to a termination of employment. Moreover, Mr. Smallwood himself stated at one point in his evidence that since the grievor was not on a schedule, there was no urgency to terminate him. Until Mrs. Penny became aware on September 28th that the complainant trade union had become involved in the grievor’s pursuit of Saturdays only work, she appears to have been content to permit the grievor to remain a part-time employee despite his lack of a schedule. Moreover, her failure to give the grievor notice of termination on September 25th even though she “still did not have a Saturdays only schedule open” at that time provides a further indication that she was willing to retain him as a part-time employee who would be given Saturday work if and when it became available.

26. It is evident from Mrs. Penny’s testimony that as late as September 25, 1981, she was not contemplating the termination of the grievor’s employment. In response to counsel for the complainant’s question, “How was it left on the 25th?”, Mrs. Penny testified: “I had nothing available for [the grievor]. I assumed that the next move was up to him.” She also suggested that she expected that the grievor would “let [her] know if he had other nights available.”

27. Apart from the telephone call received by Mr. Smallwood from Mr. Cumiskey as a result of a contact made with the respondent’s counsel by an organizer of the complainant in relation to the difficulties that the grievor was experiencing in obtaining hours, and the grievor’s statement to Mrs. Penny that he was coming in to work on Saturday, spoken in conjunction with a reference to the union, nothing had changed with respect to the grievor’s work situation between September 25th and September 28th. Mrs. Penny was fully aware on September 25th that she had no Saturdays only schedule for the grievor. Thus, if that was the true reason for the grievor’s termination, as specified by Mrs. Penny on his notice of termination and on his employment record, it is difficult to understand why the grievor was not given two weeks’ notice of termination on September 25th rather than on September 28th.

28. During cross-examination Mrs. Penny denied that she decided to terminate the grievor “all of a sudden” after concluding on September 25th that “the union people had called Mr. MacDermid to explain about Mr. Lauber not getting Saturday hours”. She testified that the grievor’s “restricted availability to Saturdays only was discussed between Mr. Smallwood and [herself] after September 11th”. She further testified that on September 25th before she spoke with the grievor she discussed with Mr. Smallwood what would be done with the grievor but “nothing definite” was decided. Mr. Smallwood, on the other hand, had no recollection whatever of that discussion.

29. Having regard to all of the evidence and the submissions of the parties, the Board is not satisfied on the balance of probabilities that the reasons for the termination of the grievor were not tainted by any anti-union motivation. In particular, we do not believe that the fact that the complainant attempted to assist the grievor with the scheduling difficulty that he was

encountering with the respondent, and the fact that the grievor referred to the union in support of his rather militant stance with respect to Saturday work during his first meeting with Mrs. Penny on September 28th, had nothing to do with his discharge. Indeed, Mrs. Penny herself stated during cross-examination that it was because of the grievor's "attitude" that she and Mr. Smallwood decided to terminate his employment on September 28th and "not keep him hanging in the wings". However, she neglected to make any reference to that "attitude" on the grievor's notice of termination and on his personnel card. Under the circumstances, it is reasonable to infer that the reason for this omission was that the grievor's apparent willingness to resort to the complainant for assistance with his scheduling problem was at least part of the "attitude" which Mrs. Penny and Mr. Smallwood found to be unacceptable. Further support for this inference is provided by our finding that Mrs. Penny was less than candid with the Board when, in response to the question put to her by counsel for the complainant, "You weren't very happy that [the grievor] would go to the union?", she stated, "Well I don't know anything about that. I don't recall if I was pleased or displeased." Having regard to all of the circumstances, the Board concludes that if Mr. Smallwood had not received Mr. Cumiskey's telephone call on September 28th by which he was made aware of the union's involvement in the matter and if the grievor had not referred to the union in support of his increasingly militant stance with respect to Saturday work, the grievor would have been permitted for an indeterminate period of time to remain an employee of the respondent awaiting the availability of Saturday work or a change in his personal circumstances that would permit him to be scheduled for work at other times.

30. Counsel for the respondent contended that it would be senseless for the respondent to discharge an employee for anti-union reasons after the union was certified. However, as submitted by counsel for the complainant, the discharge of a known union supporter could well be calculated to have a demoralizing and chilling effect on a bargaining unit just as collective bargaining was about to commence. Moreover, the precipitate act of discharging the grievor within minutes after his reference to the union in support of his stance with respect to Saturday work may well reflect not a calculated scheme to impair the complainant's bargaining rights, but rather merely an ill-advised impulsive reaction by Mrs. Penny and Mr. Smallwood to the unfamiliar "attitude" of an employee who dared to exercise his right under the Act to enlist the aid of his bargaining agent with respect to a problem concerning his employment.

31. For the foregoing reasons, it is our conclusion that the termination of the grievor was tainted by anti-union motivation and that the respondent breached section 66 of the Act by refusing to continue to employ the grievor because he was a member of the complainant trade union or was exercising his right under the Act to enlist the aid of the complainant trade union in attempting to resolve a problem concerning his employment.

32. We further find that by permitting the grievor to work the Saturday hours available on September 12, 19 and 26, the respondent granted the grievor a personal privilege to work such Saturday hours as the respondent had available from time to time at its Bayview Village store in a position for which he was qualified. That personal privilege was a "privilege" within the meaning of section 79 of the *Labour Relations Act*. We further find that in altering that privilege without the consent of the complainant by terminating the grievor's employment on September 28, 1981, the respondent contravened section 79(1) of the Act, since its action occurred within the period during which such conduct is prohibited by that section.

33. The Board therefore orders:

- (1) that Mark Lauber be reinstated by the respondent as a part-time employee at its Bayview Village Shopping Centre store;
- (2) that Mark Lauber be fully compensated by the respondent for the lost wages and benefits sustained through the respondent's violations of the Act;
- (3) that the respondent pay interest on the compensation for lost wages ordered by the Board, such interest to be calculated in the manner described in Practice Note 13, dated September 8, 1980 (published in [1980] OLRB Rep. Sept.);
- (4) that, subject to section 79(1) of the Act, Mark Lauber be permitted by the respondent to work such Saturday hours as the respondent has available from time to time at its Bayview Village Shopping Centre store in a position for which he is qualified, and such other hours as may from time to time be mutually agreed upon by Mark Lauber and the respondent; and
- (5) that the respondent post copies of the attached notice marked "Appendix", after being duly signed by the respondent's representative, in conspicuous places on its premises at its Bayview Village Shopping Centre store where it is likely to come to the attention of the employees and keep the notices posted for sixty consecutive working days. Reasonable steps shall be taken by the respondent to insure that the said notices are not altered, defaced or covered by any other material. Reasonable physical access to the premises shall be given by the respondent to a representative of the complainant so that the complainant can satisfy itself that this posting requirement is being complied with.

34. The Board remains seized of this matter in the event that a dispute arises concerning the implementation of the Board's order.

The Labour Relations Act

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NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH WE AND THE UNION PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY REFUSING TO CONTINUE TO EMPLOY MARK LAUBER AND BY ALTERING WITHOUT THE CONSENT OF THE UNION MR. LAUBER'S PRIVILEGE TO WORK SUCH SATURDAY HOURS AS WE HAVE AVAILABLE FROM TIME TO TIME AT THIS STORE IN A POSITION FOR WHICH MR. LAUBER IS QUALIFIED.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

- TO ORGANIZE THEMSELVES,
- TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION,
- TO ACT TOGETHER FOR COLLECTIVE BARGAINING,
- TO ENLIST THE AID OF A TRADE UNION THAT HAS BEEN CERTIFIED AS THEIR BARGAINING AGENT, IN ATTEMPTING TO RESOLVE EMPLOYMENT PROBLEMS THAT THEY ENCOUNTER WITH THEIR EMPLOYER,
- TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

WE WILL NOT REFUSE TO CONTINUE TO EMPLOY OR OTHERWISE DISCRIMINATE AGAINST ANY EMPLOYEE BECAUSE HE OR SHE HAS JOINED THE SERVICE EMPLOYEES' INTERNATIONAL UNION, LOCAL 204, OR BECAUSE HE OR SHE IS EXERCISING ANY OTHER RIGHTS UNDER THE LABOUR RELATIONS ACT.

WE WILL OFFER TO REINSTATE MARK LAUBER AS A PART-TIME EMPLOYEE AT THIS STORE.

WE WILL COMPENSATE MARK LAUBER FOR ANY WAGES AND BENEFITS THAT HE HAS LOST AS A RESULT OF OUR REFUSAL TO CONTINUE TO EMPLOY HIM, PLUS INTEREST.

WE WILL PERMIT MARK LAUBER TO WORK SUCH SATURDAY HOURS AS WE HAVE AVAILABLE FROM TIME TO TIME AT THIS STORE IN A POSITION FOR WHICH HE IS QUALIFIED, AND SUCH OTHER HOURS AS MAY FROM TIME TO TIME BE AGREED UPON BY MR. LAUBER AND OURSELVES.

K-MART CANADA LIMITED

PER: (AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced

This notice must remain posted for 60 consecutive working days.

1739-81-R Labourers' International Union of North America, Local 506, Applicant, v. North American Canadian Developments Ltd. carrying on business as **N. A. Constructions**, Respondent, v. Group of Employees, Objectors.

Membership Evidence—Co-employee paying dollar on behalf of two employees—No intention of paying back and in fact not repaid—Collector not inquiring whether intended to repay—Whether Board accepting membership evidence

BEFORE: Ian Springate, Vice-Chairman, and Board Members J. Wilson and H. Kobryn.

APPEARANCES: *Ian Roland, Peter Hitchen and Mike Mihajlovic for the applicant; I. W. Fefergrad and Ken Waldman for the respondent; Michael Horan for the objectors.*

DECISION OF THE BOARD; January 11, 1982

1. This is an application filed pursuant to the construction industry provisions of the *Labour Relations Act*.

• • •

3. To date the Board has dealt only with an allegation that two employees who applied for membership in the applicant trade union, namely, Mr. Dan Horner and Mr. George Robitaille, did not pay a dollar on their own behalf in connection with their applications. Mr. Mike Mihajlovic, a business agent with the applicant trade union, signed the receipt portion of the relevant membership documents indicating that he had received a dollar from both of the employees in connection with their membership applications.

4. Mr. Mihajlovic attended at one of the respondent's job sites on November 10, 1981 and talked to four employees about joining the applicant. At least three of these employees indicated a desire to become members of the applicant, namely, Mr. Horner, Mr. Robitaille and Mr. Tim Young. Mr. Mihajlovic then handed out applications for membership for them to sign, and also advised them that they would each have to pay one dollar in connection with their application. Mr. Mihajlovic also indicated to the employees that if they did not have the money on them, they could borrow it from a fellow employee.

5. Mr. Robitaille testified that at the relevant time he had only two dollars on him which he intended to use for lunch, and accordingly he asked Mr. Young to lend him a dollar. Mr. Young then handed one dollar to Mr. Mihajlovic on Mr. Robitaille's behalf. It should be noted that Mr. Mihajlovic testified that he was certain that the money had first been given to Mr. Robitaille, who had then handed it over. The weight of the evidence, however, supports Mr. Robitaille's contention that the money was actually handed directly to Mr. Mihajlovic by Mr. Young. Mr. Robitaille testified that at the time in question he did not actually intend to repay Mr. Young and, further, did not believe that Mr. Young expected to be repaid. Mr. Robitaille stated that he regarded the transaction as involving the type of "loan" which employees sometimes make to one another without the expectation that it would be repaid. Mr. Robitaille noted that on previous occasions Mr. Young had "borrowed" money from him and not paid it back. Mr. Robitaille and Mr. Young did not later discuss the repayment of the dollar, and Mr. Robitaille never did repay the amount to Mr. Young.

6. Mr. Horner testified that when Mr. Mihajlovic asked him for a dollar, he had no money on him. According to Mr. Horner, Mr. Young then volunteered to cover the amount. On this point, however, we prefer the evidence of Mr. Robitaille, who stated that he heard Mr. Horner ask Mr. Young to lend him a dollar, in response to which Mr. Young said "here's a dollar" and passed the money over to Mr. Mihajlovic. Mr. Horner testified that he never intended to repay Mr. Young, that the two of them had not subsequently discussed the matter, and that the dollar had never been repaid. Mr. Horner also stated that if he did have a dollar at the relevant time, he likely would not have given it to Mr. Mihajlovic, but instead saved it to buy himself a drink.

7. Mr. Mihajlovic testified that he assumed that any money borrowed by the employees would be repaid. It is clear, however, that Mr. Mihajlovic made no inquiries to ascertain whether Mr. Robitaille and Mr. Horner actually regarded themselves as indebted to Mr. Young and intended to repay him.

8. Section 1(1)(1) of the Act defines a "member" of a trade union as including a person who has both applied for membership in the trade union and also paid to the trade union on his own behalf at least one dollar. What is now section 1(1)(1) was first enacted by *The Labour Relations Amendment Act 1970*. This section gave statutory force to what was already a well established Board policy. Indeed, as early as February 16, 1951, the Board issued a statement of policy which stipulated that for the Board to regard an employee as a member of a trade union, the employee must not only have applied to become a member of the union, but also have paid to the union, on his own behalf, at least one dollar. The purpose of the requirement of the money payment was discussed as follows in the *R.C.A. Victor Company Ltd.* case 53 CLLC ¶17, 067 at pp. 1469-70:

It need hardly be pointed out that the Board cannot accept as evidence of payment anything in the nature of a monetary contribution from a person other than an applicant for membership. The money payment constitutes confirmatory evidence of the desire of the payer to become a member of the trade union. If no financial sacrifice is made by the person himself, the only evidence submitted on his behalf is a signature on an application card which the Board has long since held to be inadequate to establish membership. On the other hand, not every loan to a prospective member, especially where the money is repaid, will be fatal to an applicant's case.

9. We are satisfied that at the time they signed their applications for membership, neither Mr. Horner nor Mr. Robitaille had any intention of repaying Mr. Young, and that they in fact did not do so. Accordingly, we are led to the conclusion that there was no real financial sacrifice on their part. See: *Sandercock Construction Limited*, [1970] OLRB Rep. April 147. In these circumstances, and taking into account the fact that the so-called "loans" were made in an informal manner in front of the collector who made no attempt to ascertain whether in fact there was a true intent to repay the money, as well as the fact that the collector actually received the money from another employee, we are satisfied that the Board should give no weight to the membership evidence filed on behalf of either Mr. Horner or Mr. Robitaille.

10. At the hearing, counsel for the group of objectors contended that the Board should decline to give weight to any of the membership evidence which Mr. Mihajlovic signed as the

collector. Were we of the view that Mr. Mihajlovic had been aware of the lack of intent on the part of Mr. Horner and Mr. Robtaille to repay Mr. Young, we might well view such a course of action as justified. As it is, however, we are satisfied that Mr. Mihajlovic believed that a *bona fide* loan had in fact been made to the two employees. Further, it was not alleged that any other membership evidence collected by Mr. Mihajlovic involved the loaning of money. In these circumstances, we are not prepared to set aside the remaining membership evidence collected by Mr. Mihajlovic.

11. It was also contended by counsel for the objectors that the Board should reject all of the evidence of membership filed by the applicant on the grounds that Mr. Peter Hitchen, who signed the Form 8 Declaration Concerning Membership Documents, had not made sufficient inquiries of Mr. Mihajlovic prior to signing the declaration. This contention was rejected orally at the hearing in that the evidence revealed that Mr. Hitchen had made reasonable inquiries of Mr. Mihajlovic concerning both the signing of the cards and the payment of money but that Mr. Mihajlovic did not advise him of the "loans" made by Mr. Young.

12. This application for certification is to be re-listed for hearing to hear the evidence and the representations of the parties with respect to all outstanding issues. The matter is referred to the Registrar.

0755-80-M; 0876-80-M; 0940-80-M Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, Complainant, v. **Napev Construction Limited**, Respondent.

Construction Industry Grievance – Jurisdictional Dispute – Practice and Procedure – Whether filing of grievances with Board triggering "jurisdictional dispute" within meaning of Act – Whether respondent "employer" for purposes of section 91 – Board adjourning grievance hearing to permit respondent to file jurisdictional dispute application

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members J. Wilson and O. Hodges.

APPEARANCES: *D. J. Wray and M. Whelan for the applicant; S. McCormack, B. Pollock and P. Shichkov for the respondent.*

DECISION OF THE BOARD; January 18, 1982

1. These are three grievances filed under section 124 of the *Labour Relations Act*. The complaints concern the respondent's hiring practices on certain projects in which it was engaged in the summer of 1980. The complainant contends that certain work should have been done by its members and that the subcontracting of that work to subcontractors not in contractual relations with the Carpenters' union, constitutes a breach of the collective agreement between the complainant and the respondent. The complainant seeks compensation for its members along the lines discussed by the Court of Appeal in *Blouin Drywall*

Contractors Limited v. United Brotherhood of Carpenters and Joiners of America, Local 1486 (1975) 8 O.R. (2d) 103. The complainant will be referred to as “the union”, and the respondent will be referred to as “Napev”.

2. These proceedings were commenced by the union in mid-summer of 1980, shortly after it discovered that the formwork on two of Napev’s projects was not being done by carpenters. In accordance with its usual practice, the Board appointed a Labour Relations Officer to meet with the parties and attempt to effect a settlement of the matters in dispute between them. The case came on for a hearing in early September. At that hearing, both parties addressed what was characterized by Napev as a “preliminary issue”, namely, that the case involved a jurisdictional dispute and that the Board should defer any consideration of whether there had been a breach of Napev’s collective agreement until the jurisdictional dispute question had been resolved pursuant to section 91 of the Act.

3. At the hearing in September, the facts were not as clear and complete as they might be, although the basic situation was not in dispute. Neither party sought to lead evidence, and both parties requested the opportunity to make written submissions. Thereafter, however, the Board was advised that the parties were continuing their settlement efforts and that it should postpone issuance of its preliminary decision until those settlement efforts were exhausted. No doubt the parties were aware that even if Napev’s submissions were accepted and the Board deferred to the jurisdictional dispute mechanism, that procedure would not necessarily absolve Napev of liability for a contractual breach. The parties were also undoubtedly aware of the length, complexity, and resulting costs of a jurisdictional dispute proceeding and the real possibility of exacerbating relationships with the various unions which would necessarily be involved. In any event, the parties’ settlement efforts came to naught, and in the spring of 1981, the Board was so advised. Unfortunately, the death of Board Member G. Armstrong prior to the issuance of its decision generated further delay and uncertainty which was only resolved in the fall of 1981 when the parties agreed to substitute Board Member J. Wilson as the employer nominee. The decision of the Board, thus reconstituted, follows.

4. The work in question is the concrete forming performed at two “ICI projects” in the City of Mississauga” the South Common Community Centre, and the Meadowvale Secondary School. Napev did not use its own forces to perform this work, nor did it engage subcontractors in contractual relations with the Carpenters’ union. The formwork at the South Common Community Centre was subcontracted to Hi Rise Forming Limited (“Hi Rise”), which used members of Local 183 of the Labourers’ International Union to do it. The concrete formwork at the Meadowvale Secondary School was subcontracted to Halton Forming Limited (“Halton”) which also performed the work using members of Local 183 of the Labourers’ International Union. In both cases, the work was subcontracted shortly after the project began pursuant to earlier discussion with Hi Rise and Halton.

5. While it is clear that the concrete forming work was done by members of Labourers’ Local 183, it is by no means clear what contractual relationship Hi Rise and Halton have with that union. Hi Rise and Halton, of course, were not parties to the present proceedings, nor did either party fully canvass this issue. We make this observation because both Locals 506 and 183 of the Labourers’ International Union do formwork, but it is Local 506, the so-called “ICI Local” which one would generally expect to find doing that kind of work on an ICI project in Mississauga. We are also aware that many forming companies are bound by a separate agreement with Local 183 (i.e., not the province-wide ICI agreement) which might not even

have any application to this ICI project. Both factors may be relevant to the alleged jurisdictional dispute and to the preliminary argument raised by Napev (see *infra*).

6. The relevant provisions of the *Labour Relations Act* are as follows:

91-(1) The Board may inquire into a complaint that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trade unions, was or is requiring an employer or an employers' organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class, or that an employer was or is assigning work to persons in a particular trade union rather than to persons in another trade union, and it shall direct what action, if any, the employer, the employers' organization, the trade union or the council of trade unions or any officer, official or agent or any of them or any person shall do or refrain from doing with respect to the assignment of work.

• • •

(18) Where an employer is a party to or is bound by two or more collective agreements and it appears that the description of the bargaining unit is one of such agreements conflicts with the description of the bargaining unit in the other or another of such agreements, the Board may, upon the application of the employer or any of the trade unions concerned, alter the description of the bargaining units in any such agreement as it considers proper, and the agreement or agreements shall be deemed to have been altered accordingly.

7. The first branch of Napev's argument is that the filing of a complaint under section 124 alleging a breach of the Carpenters' collective agreement, in itself, precipitates a jurisdictional dispute within the meaning of section 91(1) of the Act. Napev argues that the grievances, in effect, are a claim for the work in question, even though there has been no actual demand of Napev either that it assign the work to carpenters, or require Hi rise and Halton to assign the work to carpenters, or enter into new subcontracts with subcontractors in contractual relations with the Carpenters' union. It is conceded that the grievances themselves merely seek damages for a breach of contract, and that there is no request for an alteration of the work assignment, nor has any member or official of the union ever made such request. Napev contends, however, that the grievances raise the possibility that it might have to "pay twice" for the concrete forming work on these two projects (i.e., to the subcontractors who actually did it and, by way of damages, to the Carpenters' union whose members, it is claimed, should have done it), and that this spectre of potential liability should be equated with an express request for the work by the Carpenters' union — although it must be noted that Napev did not in fact approach Halton or Hi Rise or seek to effect a reassignment of the work.

8. Napev further argues that it should be regarded as "the employer" to whom a work assignment request is made, even though there is no common law employer-employee relationship between Napev and the persons by whom the work was done. Napev argues that it should be treated as "the employer" for the purpose of section 91 because (subject to the terms

of the subcontract and the liability any breach of the subcontract might entail) it has the ultimate authority to effect a reassignment of the work either to carpenters in its own employ or to a compatible carpentry subcontractor. But, it is conceded in the instant case that Napev did not in fact make any attempt to effect a reassignment of the work, nor did it respond to the alleged request by actually filing a jurisdictional dispute — although it did plead in its response to the section 124 proceeding that the matter should be dealt with under section 91. In the circumstances therefor, even if one treats the grievances as a work assignment request, Napev cannot be regarded as an “agent” of the Carpenters’ union transmitting that request to the “real employer”. The constructive agency notion referred to in some of the Board’s cases can have no application here.

9. The second branch of Napev’s argument involves what it claims are conflicting contractual obligations by which it is bound. The company is bound by both the Labourers’ and Carpenters’ province-wide ICI agreements. These agreements, it is submitted, both contain “no subcontracting” clauses in respect of the work covered by them. But, argues Napev, the work jurisdiction overlaps, so that the company is inevitably faced with a “Hobson’s choice”. If it subcontracted the work to a subcontractor with contractual relations with the Carpenters’ union, the Labourers would file a grievance. If, as it did, it subcontracted to firms with a relationship with the Labourers’ union, the Carpenters would file a grievance. This, argues Napev, is precisely the kind of dilemma which section 91(18) was designed to resolve. (We might note again, however, in respect of the province-wide Labourers’ agreement, that in Board Area 8 it is the work jurisdiction of Local 506 which is predominantly involved and here it was members of Local 183 who did the work — perhaps pursuant to a different agreement altogether. Neither Napev nor the union actually filed a copy of the Labourers’ agreements.)

10. The union asserts that the essential preconditions for a jurisdictional dispute under section 91(1) have not been met. There has been no request for an assignment or reassignment of the work, either directly or indirectly. Napev cannot be regarded as the union’s agent and, in any event, did not attempt to effect a reassignment of the work to carpenters. Nor did Napev file a jurisdictional dispute to resolve any question concerning the propriety of its subcontracting arrangements. If it had really been concerned with having to pay twice, it would have acted promptly. The union argues further that Napev is not the employer of the individuals actually doing the work. There has been no request for a reassignment of work made of Halton or Hi rise, therefore section 91(1) can have no application. The union points out that Napev’s argument on this issue was carefully considered and rejected in an earlier case in which the company itself was involved — see: *Napev Construction Limited*, [1980] OLRB Rep. Feb. 264. The union relies upon both the result and the legal analysis in that case, and argues that the Board should not depart from its earlier reasoning.

11. With respect to the alleged conflicting collective agreement, the union argues that no such conflict exists, and reserves its right to lead evidence and make argument on that issue. And, insofar as Local 183 is concerned — and that is the only local of the Labourers’ union involved — the union asserts that the province-wide Labourers’ agreement gives it no right with respect to form work in Board Area 8. There can be no jurisdictional dispute between the Carpenters and Local 183 on these two ICI projects. Even if there were overlapping work jurisdictions — which the union denies — it would only be Labourers’ Local 506 with which a jurisdictional dispute could arise. In the circumstances, argues the union, how can Napev rely on a subcontracting arrangement to an employer using members of Local

183 (which in itself may be a breach by Napev of the Labourers' province-wide ICI collective agreement) to sustain its claim that there is a jurisdictional dispute which must be resolved before dealing with the alleged breach of the Carpenters' collective agreement?

12. We have carefully considered the submissions of the parties and we are not, at this time and in the circumstances of this case, prepared to accede to Napev's request and reconsider the analysis adopted by the Board in *Napev, supra*. Nor do we think that the expeditious resolution of alleged contractual violations should be derailed by the mere assertion by a respondent employer that there is a jurisdictional dispute or that there are conflicting work jurisdiction provisions in the relevant province-wide collective agreements. A respondent should be in a position to establish at least a *prima facie* case that there is a jurisdictional dispute before the Board defers to that procedure. To hold otherwise would invite parties to raise unsubstantiated preliminary objections for the purposes of "buying time" — thereby undermining the very purpose which section 124 was designed to achieve.

13. We have some considerable doubt as to whether the respondent in the instant case has met this standard and also whether a jurisdictional dispute proceeding would materially affect the result of the section 124 application. But the difficulty is that the argument with respect to section 91(18) is a novel one involving, initially at least, a close analysis of the allegedly conflicting collective agreements — yet neither party addressed this matter in any detailed way. The Labourers' agreement was not even filed with the Board. Napev simply asserted that there was a conflict; while the union reserved its right to lead evidence and argument with respect to that issue. There is also some question as to whether section 91(18) operates independently of section 91(1) (the provision seems to duplicate, to some extent, section 91(15)) or the effect, if any, which a determination under section 91(18) might have on a section 124 proceeding. The resolution of most of these questions, of course, would most appropriately be accomplished by having all parties to the allegedly conflicting agreements present, and this in turn could best be accomplished pursuant to section 91. Accordingly, the Board is persuaded in the circumstances that it should adjourn the section 124 proceedings so that Napev may file a jurisdictional dispute pursuant to section 91 of the Act. Napev will have twenty-one days from the release of this decision to file a jurisdictional dispute. Given the possible interrelationship between the merits of the section 124 case and the section 91 remedy, if Napev files a jurisdictional dispute the panel seized with the jurisdictional dispute issue is the more appropriate forum for resolving all aspects of the case. Accordingly, we have restricted this decision solely to the preliminary issue raised by the parties.

0557-80-R Ontario Nurses' Association, Applicant, v. Oakwood Park Lodge, Respondent.

Employee – Whether nurses employed by nursing home exercising managerial functions – Whether nurses' supervisory functions stemming from management or professional status

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members B. K. Lee and F. W. Murray.

APPEARANCES: Dan Anderson, Katherine Moore, Marilyn Jacobs and Nicky Boyd for the applicant; L. Bertuzzi, R. Stevenson and M. Cox for the respondent.

DECISION OF THE BOARD; January 28, 1982

I

1. This is an application for certification. The applicant union seeks to be certified as the bargaining agent for a group of registered nurses employed at the respondent's nursing home in Niagara Falls, Ontario. The respondent contends that its entire complement of nurses — both full-time and part-time — exercise "managerial functions", and, in consequence, are not "employees" within the meaning of the Act. In the respondent's submission, they are not entitled to engage in collective bargaining. The applicant, on the other hand, argues that the nurses' functions do not differ significantly from those of many other nurses in other hospitals, nursing homes and health units throughout Ontario, and that to find that the nurses in the instant case are not "employees", would be inconsistent with both the results, and the principles, enunciated in the many Board decisions involving nurses in these other institutions.

2. By a decision dated October 29, 1980, the Board decided that it would inquire into the duties and responsibilities of the subject individuals, notwithstanding an earlier decision of the Board (in 1977) between different parties concerning their status. An application for judicial review of that decision was dismissed in early November 1981. Meanwhile, in accordance with its usual practice, the Board appointed a labour relations officer to conduct an inquiry and report to the Board.

3. The parties were agreed that the evidence of two nurses — Angela Bain and Margaret Ballam — would be representative of all of the nurses in the proposed unit. Subject to this agreement, both parties had a full opportunity to lead their evidence respecting the matters in dispute. Following the release of the examiner's report (which includes some 200 pages of evidence and exhibits), the parties were also extended the opportunity to make submissions concerning the opinion which, in their view, the Board should reach as a result of the evidence before it.

4. In view of the circumstances of this case and the submissions of the parties, it may be useful to refer initially to the jurisprudential background against which this decision must be made. This is not the first time that the Board has had to deal with the status of nurses, nor is it the first time that an employer has argued that all of the nurses in its employ must be excluded from collective bargaining because of their relationship with less skilled members of the health care team (who in this case, it might be noted, are in a separate bargaining unit, represented by another union). Similar submissions were made in: *Corporation of the City of Hamilton*

(*Macassa Lodge*), [1972] OLRB Rep. July 697; *Villacentres Ltd.*, [1973] OLRB Rep. Dec. 646; *Crescent Park Lodge*, [1978] OLRB Rep. Nov. 981; *Peel Manor Home for the Aged*, [1979] OLRB Rep. Jan. 52; *Belvedere Home for the Aged*, [1978] OLRB Rep. Oct. 890; and *Regional Municipality of Halton*, [1980] OLRB Rep. Nov. 1684. In each of these cases, the Board rejected the employer's assertion that his entire complement of nurses exercised managerial functions; and, in each case, the Board applied, or built upon, the approaches developed in earlier "health care sector" cases such as: *Peterborough Civic Hospital*, [1973] OLRB Rep. March 154; *Ajax and Pickering Hospital*, [1970] OLRB Rep. Feb. 1283; *Essex Health Association*, [1970] OLRB Rep. Nov. 824; and *Toronto East General Orthopaedic Hospital*, [1974] OLRB Rep. Oct. 671. It may be useful therefore, to review the background of section 1(3)(b) of the Act, and the way in which the Board has approached its application in the health care field.

5. Section 1(3)(b) of the Act currently reads as follows (emphasis added):

1(3) Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee,

(b) who, *in the opinion of the Board*, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

6. Section 1(3)(b) has been in the statute in its present form since 1957, when, following the decisions of the Supreme Court in *Re O.L.R.B., Bradley et al and Canadian General Electric Co. Ltd.*, [1957] O.R. 316(C.A.) rev'g [1956] O.R. 437 (O.H.C.), the Legislature amended the section to clarify the Board's jurisdiction and authority. The "old" wording read:

(3) For the purposes of this Act, no person shall be deemed to be an employee, . . .

(b) who is a manager or superintendent or who exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

This change in statutory language did not change the basic problem to which section 1(3)(b) is addressed.

7. The purpose of section 1(3)(b) is to ensure that persons who are within a bargaining unit do not find themselves faced with a conflict of interest as between their responsibilities and obligations as managerial personnel, and their responsibilities as trade union members or members of the bargaining unit. Collective bargaining, by its very nature, requires an arm's length relationship between the "two sides" whose interests and objectives are often divergent. Section 1(3)(b) ensures that neither the trade union, nor the employer and its management team, need be concerned that its members will have "divided loyalties". This purpose has been succinctly stated by the British Columbia Labour Relations Board in *Corporation of the District of Burnaby*, [1974] 1 Can. LRBR 1 at page 3:

"The explanation for this management exemption is not hard to find. The point of the statute is to foster collective bargaining between

employers and unions. True bargaining requires an arm's length relationship between the two sides, each of which is organized in a manner which will best achieve its interests. For the more efficient operation of the enterprise, the employer establishes a hierarchy in which some people at the top have the authority to direct the efforts of those nearer the bottom. To achieve countervailing power to that of the employer, employees organize themselves into unions in which the bargaining power of all is shared and exercised in the way the majority directs. Somewhere in between these competing groups are those in management — on the one hand an employee equally dependent on the enterprise for his livelihood, but on the other hand wielding substantial power over the working life of those employees under him. The British Columbia Legislature, following the path of all other labour legislation in North America, has decided that in the tug of these two competing forces, management must be assigned to the side of the employer.

The rationale for that decision is obvious as far as the employer is concerned. It wants to have the undivided loyalty of its senior people who are responsible for seeking that the work gets done and the terms of the collective agreement are adhered to. Their decisions can have important effects on the economic lives of employees, e.g., individuals who may be disciplined for "cause" or passed over for promotion on the grounds of their "ability". The employer does not want management's identification in the activities of the employees union.

More subtly, but equally as important, the exclusion of management from bargaining units is designed for the protection of employee organizations as well. An historic and still current problem in securing effective representation for employees in the face of employer power is the effort of some employers to sponsor and dominate weak and dependent unions. The logical agent for the effort is management personnel. One way this happens is if members of management use their authority in the work place to interfere with the choice of a representative by their employees. However, the same result could happen quite innocently. A great many members of management are promoted from the ranks of employees. Those with the talents and seniority for that promotion are also the very people who will likely rise in union ranks as well. In the absence of legal controls, the leadership of a union could all be drawn from the senior management with whom they are supposed to be bargaining. If an arm's length relationship between employer and union is to be preserved for the benefit of employees, the law has directed that a person must leave the bargaining unit when he is promoted to a position where he exercises management functions over it."

Similar observations concerning the purpose of section 1(3)(b) have been made by the Ontario Board. In *Toronto East General Orthopaedic Hospital*, (*supra*) for example, the Board had this to say:

"The section 1(3)(b) exclusions represent a legislative recognition that

viable collective bargaining requires that employers be able to effectively participate in that adversary process known generally as labour relations. It was felt that effective participation in the labour relations process — a process that centres on collective bargaining — requires some assurance of security in the ranks of management. Moreover, the inclusion of independent decision-makers, particularly decision-makers in the realm of labour relations, in the bargaining unit might compromise the judgment of such individuals. But the section has not been an easy provision to apply. Because of the complexities of the work environment and the need to balance the rights of employees to join and fully participate in a trade union against the employer's interest in maintaining its labour relations, the Board has had to make very difficult judgments in drawing the line that demarcates management from the bargaining unit; (See generally *The Corporation of the District of Burnaby and CUPE, Local 23* [1974], Can. LRBR 1 (B.C.); Reed, *White-Collar Bargaining Units under the Ontario Labour Relations Act* (1969) p. 27. For the United States approach to these exclusions see Note, *Labour Law - The National Labour Relations Board Redefines and Restricts the Scope of Managerial Employee Classification* (1973) 26 Vand. L. Rev. 850). But because *The Labour Relations Act* must be interpreted as an Act in the public interest, it is incumbent on persons who seek to exclude employees from the scheme of the Act to prove that such persons exercise managerial functions. (See *Bakery & Confectionery Workers I.U.A. v. Salmi* 56 D.L.R. (2d) 193).

8. These concerns underlie and help to explain the Board's decisions under section 1(3)(b); however, the *Labour Relations Act* itself does not contain a definition of the term "managerial functions", nor are there any specified criteria to guide the Board in forming its opinion. The task of developing such criteria has fallen to the Board, and in recognition of the fact that the exercise of managerial functions can assume different forms in different work settings, the Board has, over the years, evolved various general approaches to assist it in its inquiry. In the case of so-called "first line" managerial employees, an important question is the extent to which they make decisions which affect the economic lives of their fellow employees thereby raising a potential conflict of interest with them. Thus, the right to hire, fire, promote, demote, grant wage increases or discipline employees are all manifestations of managerial authority, and the exercise of such authority is clearly incompatible with participation in trade union activities as an ordinary member of the bargaining unit. In the case of more senior managerial personnel whose decision-making may have a less direct or immediate impact on bargaining unit employees, the Board has focused on the degree of independent decision-making authority over important aspects of the employer's business. It is evident that persons making significant executive or business decisions should be considered a part of the "management team" even though they do not exercise the kind of direct authority over employees which is characteristic of a first line foreman.

9. As we have already noted, a perusal of the Board's jurisprudence in the health care sector, and elsewhere, reveals the special significance accorded to the authority to make decisions which impact adversely on an employee's wages, benefits or job security. It is that kind of decision-making which the Board has always regarded as the exercise of a "managerial function" which justifies an exclusion from collective bargaining on the "conflict of interest"

rationale set out above. Indeed, in Ontario, the Board has extended the ambit of section 1(3)(b) beyond the actual or ultimate decision-maker, to those who make what the Board has called “effective recommendations” which materially affect the conditions of employment of those supervised. [See: *McIntyre Porcupine Mines Ltd.*, [1975] OLRB Rep. April 261, and *Inglis Ltd.*, [1976] OLRB Rep. June 270; and for a contrary view of the effect of similar provisions in the *Canada Labour code*, see: *British Columbia Telephone* 76 CLLC ¶16,015 at page 467]. In framing the test in this way, the Board has not ignored the real distinction between a person recommending or influencing a decision, and the one ultimately making it. Supplying information or “input” is not the same as deciding, and a person who does only the former has a much weaker claim when it is suggested that he is exercising “managerial functions”. Modern business organizations — especially those employing professionals, — encourage the free flow of information and ideas from subordinates to superiors. Consultation and involvement in the decision-making process, improve communication in both directions, clarify the employer’s problems and objectives, improve employee morale, and make optimum use of employee ingenuity or expertise. “Participatory management styles” have become a prevalent technique in large organizations for reducing employee alienation and increasing commitment to the goals of the employer. And, in small organizations, consultation is inevitable because of the small number of individuals who must work together effectively if the goals of the organization are to be realized. One should not conclude however, that the existence of consultation, or an apparent “democratization” of decision-making, means that real managerial authority has percolated downwards. On the other hand, there will also be situations where individuals make serious recommendations about the employment situation or security of fellow employees. If these recommendations, on the evidence, are usually acted upon to the possible detriment of those employees, then it can be said that the person making the recommendation is, if not the actual decision-maker, then one decisively influencing that decision and thereby exercising a significant influence over the livelihood or economic destiny of his co-workers. Such influence carries with it the potential for conflict to which section 1(3)(b) is directed. It remains a question of evidence whether an individual’s authority extends this far.

10. Unfortunately, as the Board noted in *Toronto East General Orthopaedic Hospital*, the line between “employees” and “management” is frequently very difficult to draw. In each case, the Board attempts to ascertain the degree of effective control which the alleged “manager” has over his “subordinates” employment relationship — bearing in mind the employees’ right to collective bargaining, and the potential for the kind of conflict which section 1(3)(b) was designed to avoid. But there is no litmus test which is universally applicable and dictates the result in every situation. In assessing each case, the Board must have due regard to the nature of the industry, the nature of the particular business, and the individual employer’s organizational scheme. Moreover, organizations, collective bargaining structures and the Board’s own jurisprudence are all in a process of evolution. In *Peterborough Civic Hospital*, [1973] OLRB Rep. March 154 the Board put it this way:

“In earlier days when this Board was formulating criteria for determining managerial functions it was confronted in the majority of cases with industrial situations. Labour relations has now evolved to the point where we are presently being confronted with increasing applications for white collar bargaining units, particularly in municipalities and other government bodies and also at Universities.

The organization of industry in many instances has evolved to the point where it differs from the period when the Board was first formulating its views about managerial functions. Some account must be taken of the changing situation. Further, while many white collar bargaining units are similar to bargaining units in the industrial sector, there are many instances where the industrial model, which we have developed at this Board, is not applicable to the white collar model. It is therefore necessary that our decisions with respect to bargaining units and managerial personnel reflect the new and evolving situations rather than reflect an oversimplified application of the former industrial criteria to the white collar area.

That approach is not unusual, and we have recognized that certain industries and certain areas require separate treatment. For example, in the construction industry and in the printing trades, working foremen are generally included in the bargaining unit to reflect the peculiarities of those industries, whereas in the industrial situation foremen are generally excluded from the bargaining unit; see e.g. *Federal Packaging and Partition Company Limited* [1971] OLRB Rep. July 448 at p. 450.

We have long recognized that in the early stages of industrial organization the foreman was a key person in the management hierarchy. Persons looking for a job came to the foreman, who had the right to hire, to fire, to grant raises and to assign work. The foreman was effectively “the king of the shop” insofar as the employees were concerned. He had a great deal of discretion and he was able to make decisions which greatly affected the welfare of the employees. Moreover, he exercised considerable control over their day to day work life. The evolving position of the foreman in industry is more fully described in the *Spruce Falls Power and Paper Co. Limited* case 47 CLLC ¶16,489, and it is not necessary for us to describe that situation any further.

However, a very important and significant factor in arriving at decisions about whether foremen were managerial was the conflict of interest theory which recognized that foremen owed a duty to management to control and discipline employees, and if the foreman was placed in the bargaining unit so as to become a union member, it would seriously impair his management function. As such, the duty to be owed to management would be incompatible with the trade union interests that he held in common with his fellow employees; cf. *Ferranti-Packard Electric Limited* [1968] OLRB Rep. Sept. 572.

The evolution of industrial organization and the advent of collective bargaining altered the position of the foreman in many situations. He is no longer the “king of the shop”; hiring and firing are done by the personnel department; the work may be controlled by the terms of a collective agreement or where there is no collective agreement the work may be controlled in a similar fashion. The result of the many changes in the hierarchal structure has diminished the foreman’s responsibility to

the point where he may be left with the vestiges of power that he once exercised and where he previously stood visibly with management he now stands on the periphery between being a member of management and being an employee. In a limited fashion he may still continue to exercise managerial functions and it is the usual rule of thumb in describing bargaining units to place a foreman in the management hierarchy.

Determinations in the white collar area have also become more difficult. We have indicated we must be cautious in using the industrial model to make assessments about non-industrial or white collar situations. However, we now have greater experience with the white collar section and we are able to draw on our specific experience in that area. In the non-industrial area we are now finding that the decision-making process and control of employees varies considerably. Like the industrial situation, personnel policies are usually developed by a personnel department, but the elements of management are usually dispersed throughout the organization. Real control and managerial functions are easily ascertained at the top of the management pyramid, but at the lower levels managerial functions are filtered through the organization in such a way that they are not easily ascertainable. Many non-industrial situations have developed a collegial decision-making process which reflect that type of organization. For example, technicians or draftsmen may work with an engineer in a white collar situation in such a manner that they participate in the decision-making process. Again, the nature of their work is such that they move from project to project so that it is difficult to ascertain who controls the employees; see e.g. *The Hydro-Electric Power Commission of Ontario* [1969] OLRB Rep. Aug. 669.

Indeed, in *Toronto East General Orthopaedic Hospital, supra*, the Board emphasized both the difficulty in making managerial status determinations, and the need to reconsider and develop its approaches in light of the changing industrial relations environment:

“Drawing the line is a particular problem where individuals are assigned more than one function, to varying degrees, or where actual decision-makers rely very heavily on the opinion of experienced and highly trained personnel. The Board then has to be very cautious in balancing the aforementioned interests of employees against those of employers. Otherwise fragments of an enterprise’s managerial function could be distributed over a great number of individuals within the enterprise or decision-makers might rely on information pooled from a great swath of lower line personnel, thereby denying legislative coverage to a large sector of the work force. Hence the Board has ruled that a person must be “primarily engaged in supervision and direction of other employees . . . [with] . . . effective control over their employment relationship”, [sic] (see *Falconbridge Nickel Mines Ltd.* [1966], OLRB Rep. Sept. 379. When assessing a person’s duties and responsibilities the Board does not look at any one function in isolation but views all functions in their entirety: (*Falconbridge Nickel Mines Ltd., supra*), moreover, titles alone

are not of much assistance in determining what a person's functions really are; (see *United Steelworkers, Local 2890 v. R. McDougall Co. Ltd.*, [1943] OWN 743). Similarly, the Board has ruled that unless a person has independent discretionary powers rather than merely incidental reporting functions which are subject to the discretion and authority of higher persons in management, there is no reason to exclude such a person from collective bargaining; (*Falconbridge Nickel Mines Ltd.*, *supra*) and an incidental or isolated involvement in some aspect of labour relations is not sufficient to exclude a person from collective bargaining; (*Falconbridge Nickel Mines Ltd.*, *supra*). With regard to managements's reliance on the advice of employees who possess highly technical skills and knowledge, the Board has said the following: (*CUPE, Local 1000 and The Hydro-Electric Power Commission of Ontario* [1969] OLRB Rep. Aug. 669.

'In addition, the fact that managerial persons rely on the expertise of senior employees or employees who possess highly technical knowledge and skills, and act upon the advice of such persons, does not change the nature of the functions exercised by the employees. The fact that an expert employee may recommend a course of action which a member of management may decide to follow does not of itself make the employee's recommendation a managerial function. Although a recommendation may be the basis of the decision taken, however, it is the *decision* to implement the recommendation which can correctly be described as the managerial function.'

But because of the dynamic contexts in which the Canadian labour relations system resides, (see John T. Dunlop, *Industrial Relations Systems* (1958) p. 7) the Board must constantly reappraise its standards and definitions as a result of its unique role in provincial labour policy formulation; (see Note, *Labour Law - The National Labour Relations Board Redefines and Restricts the Scope of Managerial Employee Classification*, *supra*, p. 862). For example, accelerated corporate growth and a rapid advance in technology have given rise to a greater concentration of economic power on the side of management and a concomitant bureaucratization of jobs that involve less supervisory duties, public contact and upward mobility. Nowhere do we see this trend more prevalent than in white collar sector of the Canadian labour market; (See generally, S. Goldenberg, *Professional Workers and Collective Bargaining*, Task Force on Labour Relations (1968); F. Bairstow, *White Collar Workers and Collective Bargaining*, Task Force on Labour Relations (1968); J. Crispo ed., *Collective Bargaining and the Professional Employee* (1966); *The Current Industrial Relations Scene in Canada*, Industrial Relations Centre, Queen's University (1974) p. S-MP-9); and many legislatures in jurisdictions where labour boards may have failed to be sufficiently appreciative of such contextual changes have now specifically provided for the extension of collective bargaining to these people; (see *Canada Labour Code*, R.S.C. 1970, c. L-1, s. 125(4), s. 107; *Labour Code of British Columbia*, S.B.C. 1973, c. 122, s. 1, s. 47;

Manitoba Labour Relations Act, C.C.S.M., c. L-10, enacted by S.M. 1972, c. 75, s. 1(k)(i), s. 2(2). The Ontario Board must be very conscious of the rapid growth in white collar employment and consider the implications it has to their decision-making function."

11. As collective bargaining extends to technical and professional employees (engineers, for example, were specifically included in the Act only in 1971), the Board had to deal with increasingly complex job hierarchies and reporting structures. In a professional context, the members of the bargaining unit are likely to be highly trained and responsible persons who are largely self-motivated, capable of exercising independent judgment and requiring little external direction in the performance of their regular duties. Such direction as is necessary will often be generated internally through group discussion, evaluation by peers, or "collegial" modes of decision-making; and one should not expect the managerial structure appropriate for professionals to be the same as that for manual workers. The technical or professional employee will have a special relationship with management, with fellow professionals, and with the less skilled employees at lower levels on the job hierarchy. It is the latter relationship which is material to this case.

12. Persons who exercise skills which have been acquired through years of training or experience will necessarily have considerable influence over those who are less trained or experienced. The most highly trained or skilled employees will routinely supervise the work of others, and it is part of their normal job functions to train and direct such persons, and to instill good work habits. Frequently, it is only the most senior or experienced employees who will fully understand the technical requirements of the job and, accordingly, it is they who will allocate work between themselves and the other employees in order to accomplish the task in a safe and efficient manner. It is part of their job to ensure that appropriate techniques are being applied and that the work is being done properly. Their expertise and technical judgement are an integral part of the group effort. In such circumstances, it is inevitable that they will have a special place on the "team" and will have a role to play in coordinating and directing the work of other employees — but this does not mean that they exercise managerial functions in the sense contemplated by section 1(3)(b) and must therefore be excluded from the ambit of collective bargaining. To adopt so rigid a view would deny thousands of skilled or professional employees the right to engage in collective bargaining, simply because they typically work in semi-autonomous work groups which include a variety of individuals with lower levels of skill, education or training (in the case of "master craftsmen", these would include "journey-men", "apprentices", and assorted "helpers"; and in the case of "professionals", a variety of "technologists", "technicians", assistants and aides). To hold that persons with higher levels of education or training (whether acquired on the job or otherwise) exercise "managerial functions" with respect to lesser skilled or unskilled individuals at lower levels of the job hierarchy would be tantamount to saying that the Act has no application to much of highly trained and educated work force which is characteristic of the emerging high technology industries. This is not to deny that professional or technical employees may also exercise "managerial functions" within the meaning of section 1(3)(b). It is simply that the focus should be upon those functions which have a direct and provable impact (positive or negative) upon the terms and conditions of employment of the alleged subordinate employees. It is that kind of function which raises the "collective bargaining" conflict to which section 1(3)(b) is addressed, and it is this collective bargaining purpose which must be kept in mind when the Board is exercising the broad authority granted to it under section 1(3)(b), and is forming its "opinion" in particular cases.

13. Of course, these themes are not new to the health care industry. Nurses were one of the first professional groups to organize and engage extensively in collective bargaining; and it is not surprising therefore, that many of these issues were first canvassed in cases involving nurses or other health care professionals. Often the person in question was a "head nurse", "charge nurse" or other person "in charge" of a hospital ward, and responsible for supervising the activities of the various R.N.s, R.N.A.s, health care aides, orderlies, kitchen staff, and so on, who made up the "health care team". These "head nurse" cases usually arose in a hospital setting, and to this extent are distinguishable from the instant case; but the significant feature of these cases which is equally relevant here, is the extent to which the Board focused on the special role of professional employees, and declined to equate supervisory or coordinating duties inherent in that role, with managerial functions. Thus, in *Essex Health Association (supra)* the Board wrote:

"Professional or semi-professional employees such as head nurses and nurses have a different relationship with management in matters falling within their professional competence and the performance of their professional duties than employees engaged in production in other industries. While the criteria applied to determine whether professional or semi-professional persons exercise managerial functions are basically the same as with persons concerned with production, in applying such criteria a distinction must be made between functions which are of a managerial nature and functions which are inherent in the exercise of such persons' professional or technical skills. *While nurses may give certain directions to others, e.g., orderlies, in the exercise of their professional skills, these directions are not dissimilar to the directions given by a journeyman to an apprentice in other crafts. Again, the reporting functions exercised by head nurses in this case may be likened to the reports one may expect from a journeyman concerning the progress of the apprentice. The head nurses report but they do not initiate independent action with respect to the employment status of others who must follow the assignments given by the head nurse. It is also interesting to note that the assistant head nurses, whom the parties have agreed are included in the bargaining unit, perform substantially the same functions as the head nurse on the shifts not worked by the head nurse.*"

This notion that certain supervisory functions are inherent in a nurse's professional responsibilities is stated explicitly in the *Standard of Nursing Practice for Registered Nurses and R.N.A.s* issued by the Ontario College of Nurses. Those standards envisage that a nurse will have supervisory and professional responsibilities vis-à-vis other employees providing health care:

"The Registered Nurse performs acts requiring substantial specialized knowledge, skill and judgement, in assessing health needs, and in planning, implementing and evaluating nursing care. These include health education, promotion and maintenance of health, prevention of illness or injury, early case-finding, rehabilitation and implementation of the prescribed medical regime. These acts are supportive and restorative to the health and well-being of individuals, families and communities and are performed either independently or in cooperation with other members of the health team.

The registered nurse is responsible for provision of effective supervision of the registered nursing assistant and is accountable for the exercise of judgement in delegation of activities to the registered nursing assistant and others who contribute to the provision of nursing care.

The Registered Nursing Assistant performs acts requiring basic knowledge, skill and judgement in planning, implementing and evaluating nursing care for individuals whose conditions are stabilized. The registered nursing assistant assists the registered nurse in giving nursing care to individuals of all ages whose conditions are not stabilized.

The registered nursing assistant contributes to the continuing assessment of health needs of individuals for whom care is provided.

The registered nursing assistant is responsible to the registered nurse for activities delegated by the registered nurse."

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Standard II The registered Nurse participates as a member of the health team.

The registered nurse:

- 1 Collaborates with other members of the health team in the planning/provision of care.
- 2 Co-ordinates nursing care with other aspects of health care.
- 3 Refers and reports pertinent information to other members of the health team.

Standard III The Registered Nurse fulfills his/her responsibilities as a member of the nursing discipline.

A. As a member of the nursing team the registered nurse:

1. Collaborates with other members of the nursing team.
2. Delegates appropriate activities to the registered nursing assistant and others who contribute to the provision of nursing care based on an understanding of that person's role.
3. Provides effective supervision for the registered nursing assistant and others to whom he/she delegates activities.

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Nurses and Co-Workers

The Nurse sustains a cooperative relationship with co-workers in nursing and other fields.

The nurse takes appropriate action to safeguard the individual when his is endangered by a co-worker or any other person.

• • •

Standard III The *Registered Nursing Assistant* fulfills his/her responsibilities as a member of the nursing discipline.

- A. As a member of the nursing team the registered nursing assistant:
 - 1. Collaborates with other members of the nursing team.
 - 2. Is responsible to the registered nurse for activities delegated to him/her by the registered nurse.

14. These standards issued by the College of Nurses (which exercises its authority pursuant to The *Health Disciplines Act* R.S.O. 1980 c. 196) expressly recognize both the “team approach” to health care, and the responsibility of the R.N. for the supervision of the R.N.A.s to whom may be delegated specific responsibilities. Similarly the standards recognize the professional responsibilities of the R.N.A. to perform in accordance with the instructions of the R.N. But the welfare of the patient is of paramount importance, and it is expected — as a professional responsibility — that a nurse will take such action as he/she deems is required when the patient’s “care is endangered by a co-worker or any other person”. In these circumstances, directions are given and action taken because she is a nurse, and quite apart from any “managerial” authority of the kind with which section 1(3)(b) is concerned.

15. The notion that effective health care requires a “team approach” has not been absent from the Board’s jurisprudence. On the contrary, the fact that health care could best be provided by a “team” and that the members of that team would have to have their functions co-ordinated by someone, was expressly recognized in *Toronto East General Orthopaedic Hospital (supra)*:

But this is not to say that every employee goes his or her own way without regard to the necessary co-ordination needed within large institutions such as hospitals. Each employee’s activities, while quite independently administered to the patient, must be co-ordinated throughout the hospital with the related activities of others. For instances, nurses must have regard to the duties of other nurses, to the duties of other nursing assistants, to the duties of ward aides and they must have regard to the directions of doctors caring for the various patients. Hence there is a tremendous need to co-ordinate the professional and technical activities of nurses and to this end elaborate policy formulations are communicated to them, and a specialized group of *co-ordinators* has been created. This group of co-ordinators includes supervisors, head nurses, assistant head nurses, charge nurses and graduate nurses on occasion. Whether any in this group of co-ordinators exercises managerial functions, as well as performing a co-ordinating function, is a question that must be decided on a case by case basis, and any inquiry must consider whether the inclusion of such people would

have a serious effect on the labour relations of the particular institution before the Board. This Board is dealing with assistant head nurses employed by Toronto East General and Orthopaedic Hospital Inc. But it must be emphasized that mere co-ordination is an insufficient function to activate the exclusionary wording of s. 1(3)(b); see *The Faculty Association of Vancouver City College (Langara) and Vancouver City College*, May 22, 1974, B.C. Labour Relations Board where Division Chairmen were included in the bargaining unit).

In *Peterborough Civic Hospital (supra)* these co-ordinating, monitoring and reporting functions were performed by the head nurses "in charge" of a ward, and were described by the Board this way:

"Head nurses stand at the very boundary between the employee group and management. The head nurse in this particular case is indicative of the role usually played by head nurses. Head nurses form a link or a liaison between management and other employees; they are in charge of a hospital floor and therefore assume many different functions. For example, a head nurse is still involved in patient care. Because of her experience she may be called upon by other nurses prior to consulting the doctor. She may also be required to assist in the orientation of nurses who are new to that particular floor. Neither of these roles is a management function, but is merely the function of the training and experience of head nurses. In addition, the head nurse carries out limited administrative duties. For example, she co-ordinates the policies of the hospital on her floor with respect to staffing. She sees that the scheduling and arranging of personnel is such that there is adequate coverage for patients. This scheduling is carried out in correspondence with a predetermined policy and the head nurse is merely implementing policies decided at a higher level. This implementation should not be confused with the decision-making or control function that goes hand in hand with management.

Also, the head nurse forms a conduit between the general staff on her floor and management, or to put it another way she has a reporting function. In this function she is a liaison between management and other employees; she enables management to "keep its ear to the ground" and in touch with the daily operations and functions of the hospital, and at the same time she is a part of the vehicle for management to convey policies and decisions to other employees. Again, this reporting function should not be confused with the exercise of managerial duties. The duty to manage and the concept of a managerial function requires a corresponding and correlative responsibility. The head nurse in this case does not have that type of responsibility that one envisions as being managerial. She is not akin to the early foreman that we have spoken about, nor does she have duties that are incompatible with placing her in the bargaining unit. There is no conflict between the duty that she owes to management and her being a member of the bargaining unit. Again in this case, as in the *Ajax and Pickering General Hospital* case, *supra*, her

very limited role indicates that she is not a member of management. For example, if an employee wants time off in excess of one hour the head nurse must consult her supervisor. Surely, if she were management she would have a greater hand in awarding time off. The type of limited responsibility permeates other areas as well and in our view her lack of responsibility indicates that she is not part of the management team.”

(See also: *Westmount Hospital* [1976] OLRB Rep. Feb. 24; and *St. Peters Hospital* [1975] OLRB Rep. March 247.)

16. All of these cases, (as well as the nursing home cases referred to earlier) involved individuals who, in varying degrees were performing various supervisory or coordinating functions which historically or in other contexts might have been associated with managerial status. Such functions included: coordinating the work of others, ensuring that the work was done properly in a technical sense, checking and correcting it where necessary, scheduling, arranging for a “fill in” if a member of the team is absent, allowing an orderly or aide to go home a few hours early, giving an opinion on the proficiency, work habits, competence or compatibility of new or lesser skilled employees when asked to do so by a member of management, delegating or rearranging work assignments, calling in plumbers or maintenance persons to handle mechanical break-downs on “off-shifts”, attempting to ensure compliance with the institutional “rules” laid down by management and admonishing or reporting an employee who did not comply, consulting with management on the running of the enterprise, and, even, on occasion, requiring an employee unfit to work to go home for the balance of the shift then reporting the incident to the director of nursing for disposition. Each case, of course, turns on its own facts, but their general thrust is the same: supervisory, coordinating, reporting, consulting and *minor* admonitory functions were not, in the opinion of the Board, (and in the context of this industry) considered to be “managerial functions”. They did not signify the kind of effective control or authority over the employee and his employment relationship which justified exclusion pursuant to section 1(3)(b). And in a professional context where “reporting” is part of an individual’s professional responsibilities and the actual decisions are made by someone else (usually an “administrator” who may or may not be a professional himself) then the “effective recommendation test” referred to above must be carefully applied. (For specific comment on employee evaluations and the need for clear evidence of their impact see: *Toronto East General Orthopaedic Hospital*, *supra*, at ¶ 16; *Ajax and Pickering Hospital*, *supra*, at ¶ 17; *Macassa Lodge*, *supra*, at ¶ 19-10; *St. Peters Hospital*, *supra*, at ¶ 7-8; *Regional Municipality of Halton*, *supra*, at ¶ 10; and *Sudbury and District Health Unit*, Board File No. 2055-79-M decision released March 11, 1981, unreported at paragraph 13.)

17. These general approaches, originally developed in a hospital setting, have also been applied in nursing homes where, as in hospitals, employers rely on registered nurses to perform health care and related supervisory responsibilities. But unlike the “head nurse cases”, the nursing home decisions have focused more directly on the relationship between the R.N. and the less qualified members of the health care team, and have been much more predictable in their outcome. Save for *Oakwood Park Lodge No. 1*, none of the reported cases have accepted the argument that the home’s entire complement of nurses — both full-time and part-time — must be excluded from collective bargaining by virtue of section 1(3)(b) of the Act. In view of the reasons for decision given in these cases, and the numerous certificates issued in respect of nurses in nursing homes, there is considerable force to the applicant’s claim

that *Oakwood Park Lodge No. 1* must be regarded as an exceptional case, somewhat at odds with the other cases arising in that sector. Moreover, it is by no means clear whether the evidence in *Oakwood Park Lodge No. 1* was developed as fully as it was before us, or even that the various cases potentially bearing on the issues in dispute were raised before the Board. The decision is very short and cites none of the earlier decisions which are arguably relevant. However, it is on the basis of the established jurisprudence (including *Oakwood Park Lodge No. 1*) and the evidence led before us, that we must make our determination.

18. With this background, we turn to the facts in the instant case.

II

19. It will be useful to reproduce, at the outset, the printed job description which purports to describe the R.N.s' duties and responsibilities. That job description reads as follows:

"As a member of the management of Oakwood Park Lodge you have the responsibility to maintain discipline and efficiency on your shift and to enforce reasonable rules and procedures in this regard.

You have the authority to establish operating standards and procedures on your shift for the care, comfort and safety of the residents.

You have the authority to assign duties, transfer, remove from duty, suspend or otherwise discipline subordinate personnel on your shift. You have the authority to plan, direct and control the work of all subordinate personnel on your shift.

You are responsible for certain necessary operational decisions affecting the running of the nursing home such as arranging for snow removal, emergency repair work, scheduling replacement personnel.

You have the responsibility to recommend the hiring, transfer, lay-off, promotion, suspension or discharge of any employee subordinate to you.

You are required to report monthly to the D.O.N. or administrator on the performance, conduct and ability of all subordinate personnel to provide written and verbal assessment on all probationary employees under your control, when requested by the D.O.N.

You have the authority to affect the terms of employment, or discharge from employment, of all personnel on your shift who are subordinate to you."

20. If the nurses actually performed the functions set out in the above noted job description, the Board would have little difficulty in concluding that they exercised managerial functions within the meaning of section 1(3)(b) of the Act. Indeed, the job description is almost a precis of precisely those duties which the Board has regarded as indicating managerial status (see paragraphs 8 and 9 *supra*). Moreover, the evidence makes it

clear that the nurses have been told that they are members of management, and told that they have, *inter alia*, disciplinary power. The difficulty is that this job description is highly misleading when compared with what the nurses actually do — and it will be recalled that section 1(3)(b) refers to an individual who “in the opinion of the Board *exercises* managerial functions.” A job description may be helpful to delimit an individual’s responsibility, but the Board must be very careful in dealing with documents which do not accord with what the alleged “manager” actually does.

III

21. At the time of the examination, there were six full-time and six part-time registered nurses (R.N.s). They worked a variety of shifts in association with varying numbers of R.N.A.s, nurses aides, kitchen, laundry, and housekeeping staff. The director of nursing, who is on the premises during the day, is responsible for drawing up the work schedules and assigning individuals to their shift and work station. The director of nurses also assigns vacations. If there are any complaints about either of these matters, they are taken up directly with the director of nursing.

22. R.N.s and R.N.A.s may “cover for each other”, or trade shifts, provided the director of nursing is advised. Shifts are also changed occasionally by the director of nursing herself. If an employee phones during the afternoon shift to advise that she will not be coming to work on the following shift, the R.N. then on duty may arrange for a replacement by running down a pre-established list of part-time employees and telephoning them until she finds one who is willing to come in. She has no authority to require someone to fill in. It appears that during the day, this kind of scheduling difficulty is handled by the office. Neither R.N. has ever asked an employee to work overtime to cover a gap in a shift.

23. Nurse Bain works on the “evening” (3:00 p.m. — 11:00 p.m.) shift. Nurse Ballam works on the “night” (11:00 p.m. — 7:00 a.m.) shift. Both nurses testified that, on those shifts, they could allow an employee to leave early — in response, for example, to illness or a family problem which had arisen (Ballam hadn’t had such request in the last year); however, if an employee requested an entire shift off, such request would have to be taken up with the director of nursing. The evidence does not indicate whether the employee would be paid for the entire shift, but, since R.N.A.s and aides punch a time clock, they presumably would not be. (Because no nurse on the day shift gave evidence, it is not clear whether they have similar authority with respect to leaving early, or whether, like the rescheduling problems referred to above, these matters are handled by the office staff or director of nursing.) If an R.N.A. or aide forgets to punch the time clock, an R.N. can sign his or her time card. There is no evidence of any employer-employee dispute arising with respect to this practice. The R.N.s themselves are expected to sign in and sign out. They do not punch a time card.

24. Both nurses described their duties and routine in some detail. For Bain, these were: counting drugs; taking a report from the nurse going off duty; making rounds to check on the patients and reading what had occurred on the earlier shifts, giving out cigarettes to residents; coffee-break; giving out medications; ensuring that the patients go to the dining room or eat in their rooms, making rounds again and doing treatments; discussing any problems which the R.N.A.s or aides were having; calling a doctor if necessary; doing another round of cigarettes and medications; writing up reports; cleaning up the medicine room; stocking drugs if necessary; and doing a report and count of drugs. Ballam gave a similar catalogue of her duties on the night shift. She visits all the patients on hourly rounds, does assorted paperwork with

respect to drug supplies and updating the patients' charts, awakens the patients at 6:00 a.m. to dispense medication, and makes a report to the R.N. on the next shift. If a patient is ill, Bain and Ballam can both call the doctor indicated on the patient's file, and receive directions over the telephone. Both nurses can also call the maintenance department to fix a mechanical breakdown, or in the case of a maintenance "emergency", can call a repairman from a list prepared by the administrator or the director of nursing. Bain once had to consult this list to call a plumber. Ballam has never used it. The two nurses write memos to the director of nurses drawing her attention to equipment in need of repair.

25. Both nurses' duties bring them into contact with other employees of the nursing home. In Bain's case, she may occasionally request how meals should be made, or trays set up or may advise the laundry that a particular patient's clothes should be labelled. Usually however the R.N.s have nothing to do with the laundry. Their principal contact is with the R.N.A.s and aides who perform their functions within the parameters established by the College of Nurses. The nurses' aides do the actual primary nursing care under the supervision of the R.N. and the particular R.N.A. who, in Bain's words, "runs the area". The R.N.A.'s higher accreditation permits them to dispense some medications and treatment, and to tell the aides how to perform such functions as bathing patients. The R.N. does not usually assign tasks to the R.N.A.s, tell them what to do, or discuss their work, because they know their established routine; however, the R.N. is responsible for ensuring that medication and treatment are being properly dispensed, and the R.N. tells the R.N.A. of any new doctor's instructions. Bain testified that it is highly unusual for her to have to correct the mistakes of others, although it is her responsibility to do so if needed. R.N.A.s are usually trained by other R.N.A.s after being shown the shift routine by the R.N.. All of the employees participate in the orientation and training of a new aide. Both R.N.s and R.N.A.s instruct aides about any new or special patient needs. Ballam testified that on the day shift, the R.N.s are too busy to be involved in training of new nurses' aides. That function, she said, was performed by the director of nursing. Complaints from residents or their families are forwarded by the R.N. to the director of nursing for her consideration and action, if any. There is no evidence that the R.N.s have ever acted upon them.

26. "Department head" meetings began to be held on a regular basis in the fall of 1980 (i.e. after the instant application was filed). These meetings discuss the situation of the home, complaints, resident's care plans and so on. They are attended by both bargaining unit and non-bargaining unit personnel. R.N.s and R.N.A.s are also involved in safety meetings. In addition, there had been infrequent meetings of the R.N.s themselves which were apparently called and attended by the director of nursing (Bain testified that there had not been such a "special" meetings of R.N.s in the last 6 months). At the R.N.s' meetings, there is no discussion of the R.N.A.'s collective agreement, collective bargaining matters, or employee grievances. To date, the R.N.s have had no role in the processing of employee grievances. Ballam had never been asked her opinion about a grievance. Bain testified that a "union problem" had arisen because of the relationship between several aides and an R.N.A., but she only learned about it later. Interestingly, the notice of the R.N.s' meeting dated September, 1979, indicates that it will be attended by the R.N.s and director of nursing from the respondent's companion home in the region, Crescent Park Lodge. The applicant union was certified to represent the R.N.s at Crescent Park Lodge in November 1978. (See *Crescent Park Lodge* [1978] Rep. Nov. 981 where the respondent's contention that all of these R.N.s were "managerial employees" was rejected.)

27. The R.N.'s authority to discipline employees will be discussed in more detail below. It suffices at this point to note that both witnesses indicated that the competence of individual aides could be raised at an R.N.s' meeting. But except for the suggestion that it might be advisable to monitor their work more closely, neither could recall any decision having been taken which bore adversely upon the individual's employment relationship with the respondent. Bain testified that there was never any suggestion, for example, that an aide should be disciplined or that an aide on probation should be let go.

28. The R.N.s are not involved in the respondent's budget making process, nor can they commit the respondent to expenditures in any significant amount. Ballam testified that salaries, budget or finances had never been discussed at the "special R.N.s' meetings". Requisitions for material or replacement equipment are dealt with by the director of nurses. R.N.s can order some prescription medications from a local pharmacy, but it is the director of nursing who orders stock drugs and supplies. R.N.s have no input into the home's manual of policies and procedures.

29. Bain has no authority to hire employees, has never been involved in interviewing employees, and has never recommended that someone be hired. Bain is not involved when an employee quits — although on one occasion, she took a telephone call from an employee who told her that she was resigning, and Bain passed this information on to Mrs. Hughes, the director of nursing. Bain said that the usual practice, as he understood it, was for the employee to write a letter to Mrs. Hughes. Ballam likewise, has never been involved in interviewing prospective employees. The R.N.s have no direct control of the employees' wage rates or progressions, and Bain testified that she was unaware of what they were. Bain has never seen, asked to see, or need to see, an employee's personnel file. There is no indication that Ballam has either. Neither had ever recommended a wage increase and there is no evidence that they had ever been consulted about such matters.

30. For the reasons which we have already set out at length above, the Board has always attached considerable significance to the degree to which an individual's decisions can impinge upon the livelihood or job security of his fellow employees. Of real importance then, is the extent to which the R.N.s in the instant case can actually influence the employment status of the other members of the health care team, and the extent to which they participate in decision-making which impacts upon them. Much of the evidence in this regard involves the R.N.'s authority to discipline and "evaluate" other employees. We will deal with each in turn.

31. Disciplining employees is a "management function", and there is no doubt that some of the documentary evidence suggests that the R.N.s have this authority. We have already mentioned the employees' job description, and the minutes of an R.N.s' meeting which Bain and Ballam attended in September 1979, indicate that the topic of "progressive discipline" (warning, then suspension, then discharge) was raised, and further that the employer had told the nurses they have disciplinary authority. The documents also indicate that employees have in fact been disciplined by written warning and suspension. What is lacking however, is *any evidence from the nurses themselves, that this purported authority has actually been exercised by R.N.s* — as opposed to Mrs. Hughes, the director of nursing. Evidence that (for example) nurses had suspended or discharged employees, or had been directly involved in the decision to do so, would be highly significant; but Mrs. Hughes did not give evidence, and none of the nurses who did give evidence have ever exercised such authority either directly or by "effective recommendation". Although discipline had been meted out,

these two nurses had never been involved in such decision-making, and there is no clear evidence that any of the other nurses had either. Insofar as the two nurses who did give evidence are concerned — and they were carefully examined on this point — the extent of “discipline” that they imposed never extended beyond a verbal admonishment that an employee should “shape up”, or “stop fooling around” or speak more quietly to a resident or observe the home rules respecting smoking areas.

32. Bain testified that if she thought it was required, she would speak to a “girl”, and if there were no improvement, she could report the matter to Mrs. Hughes for disposition. She has no recollection in the last year of “disciplining” anyone, or reporting anyone to the director of nursing. She has never sent anyone home as a disciplinary matter — although she thought that as a registered nurse, she had the authority to send someone home whose presence might threaten a patient’s well-being. She has never suspended or fired anyone, nor is there evidence that she has ever issued a written warning (which might trigger a grievance while a verbal reprimand probably would not). Bain said she had been told she has the authority to discharge someone in serious situations; but not only has she never done so, she testified that she would not, in fact, discharge anyone, but would tell them to go home, and report the matter to the office.

33. The evidence of any actual exercise of disciplinary authority by Ballam is equally thin. Again, the situations were largely hypothetical. She believed that by virtue of the College of Nurses Standards of Practice, she had the authority to discipline an aide not properly attending to a resident. But what would she do? She would “speak to the aide”, tell her to report to the office, and leave a note for Mrs. Hughes in which she would *not* make any recommendation as to what should be done. Like Bain, she had never imposed any discipline for lateness, misconduct, etc. In one instance (Ex. 26), she wrote a note to Mrs. Hughes that an employee was taking too long on her breaks; but when asked about this, she testified that she hadn’t really “warned” the person about it, and there is no recommendation on the note, or any evidence of what immediate follow-up, if any, Mrs. Hughes made. The employee was fired later Ballam thought (how, or by whom, is not clear) on account of an unrelated incident of which Ballam had no direct knowledge. In the so called “cap incident”, Mrs. Hughes had seen an aide without her cap and advised Ballam, in writing, that if she came to work again without her cap she should be sent home. Ballam testified that she didn’t know quite what the dispute was about but followed Hughes’ instructions. She *learned later* that Hughes had issued the individual a written warning. There is no indication of any involvement by Ballam. On another occasion, Ballam told an aide that if she were sleeping on the job, she would be sent home, and sent a note in those terms to Hughes. Once again, there is no indication of any follow-up, or impact on the employee other than the verbal warning.

34. It is clear that such “disciplinary authority” as the nurses exercise is carefully circumscribed. Real disciplinary authority rests with Mrs. Hughes — even on the two shifts where the respondent contends the R.N.s are fully “in charge”. It is difficult on the evidence to find any recommendations concerning discipline which materially impact upon the individuals in the other bargaining unit. Unless we totally accept the respondent’s assertion of the R.N.’s hypothetical authority, and totally ignore the functions that they actually perform, we cannot attach much weight to the disciplinary aspect of their role. The function which they actually perform are in marked contrast to their purported powers as described in their job description. This case amply illustrates why the Board must be cautious with respect to such documents. Otherwise, an employer could unilaterally exclude persons from the statute

simply by preparing an appropriate job description and telling them that they are “management” — and regardless of the functions which they actually exercise.

35. A similar problem infects the evidence of employee “evaluations” which are filled in by the R.N.s and given to Mrs. Hughes. With these, the real question is: what effect do they actually have on employees, how much weight are they given, what decisions are made, and who is involved in making them?

36. Nurses’ aides on probation are evaluated by the R.N. on a standard form on which she records her own observations, together with those of other R.N.s, R.N.A.s and aides. The evaluation is given to the aide to sign and make comments. It is then sent to Mrs. Hughes. Mrs. Hughes has never discussed an evaluation with Bain, and, while there is a place on the form for recommendations, Bain could not recall whether her recommendations had ever been followed. In one instance, Bain recalled that she had suggested on an evaluation that an employee required more supervision. The employee had indicated that she intended to quit. Subsequently, she did so. Bain was not involved.

37. The evidence indicates that the R.N.s also do evaluations of non-probationers on an annual basis at the instance of Mrs. Hughes, who asks them to fill out a prescribed form. Once again, there was no follow-up, the form does not have a place for salary recommendations, the nurses do not keep a copy, and the nurses were unaware of the effect which the evaluations might have on their co-workers’ employment conditions or status. Ballam testified that “as far as I know” the form was placed on an employee’s personnel file, but no one had ever consulted Ballam about one, nor did she know if Mrs. Hughes or anyone else talked to the employee about it. Ballam could not recall ever recommending that a probationer not be kept on. Bain knew of no decisions taken as a result of her evaluations, and, like Ballam, had never recommended a salary increase. In the case of one probationer, Ballam knew that she had left following an evaluation questioning her competence; but Ballam had no idea how long she worked thereafter, whether she completed her probationary period or not, and whether she quit or was terminated. As in the case of the nurses’ disciplinary authority, (and even applying the “effective recommendation” approach) it is difficult to accord much significance to these evaluations or, find, on the evidence, that the nurse’s role has a real impact on the other employees’ employment relationship. Once again, the written job description is quite misleading.

38. On the basis of the evidence before us, (which, we repeat appears to have been much more fully developed than in the earlier case) we cannot find that the situation here differs significantly from the numerous other nursing home situations where the Board has granted bargaining rights (see cases cited *supra*). We are not persuaded that the evidence of the nurses’ duties demonstrates the kind of conflict of interest which section 1(3)(b) was designed to avoid. On the contrary, it is our view that the unionization of the respondent’s nurses here — as has already occurred at the respondent’s other facilities — will not impair their supervisory and professional responsibilities vis-à-vis the employees in the other bargaining unit, because, *in our opinion*, the R.N.’s do not exercise “managerial functions” within the meaning of section 1(3)(b) of the Act. To so find would require an interpretation of section 1(3)(b) at odds with the Board’s earlier cases, and destructive of the dozens of successful collective bargaining relationships. There may be situations where an employer’s entire complement of nurses exercise managerial functions. This is not one of them.

IV

39. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

40. The Board further finds that:

Bargaining unit # (Full-time)

“all registered and graduate nurses employed in a nursing capacity by Oakwood Park Lodge, in Niagara Falls, Ontario, save and except the director of nursing, those above the rank of director of nursing, and those persons regularly employed for not more than twenty-four (24) hours per week; and

Bargaining unit #2 (Part-time)

“all registered and graduate nurses regularly employed for not more than twenty-four (24) hours per week in a nursing capacity by Oakwood Park Lodge, in Niagara Falls, Ontario, save and except the director of nursing, those above the rank of director of nursing,

constitute units of employees of the respondent appropriate for collective bargaining.

41. The Board is satisfied on the basis of all of the evidence before it that more than fifty-five per cent of the employees of the respondent in bargaining units #1 and #2 at the time the application was made, were members of the applicant on June 19, 1980, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

42. Certificates will issue to the applicant.

0643-81-R United Electrical, Radio and Machine Workers of America (UE), Applicant, v. **SGS Supervision Services Inc.** Qualitest Technical, Respondent.

Pre-Hearing Vote – Representative Vote – Employees laid-off day before vote – Whether having reasonable expectancy of recall – Whether eligible to vote

BEFORE: R. D. Howe, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *Arthur E. Jenkyn and John Trufal for the applicant; D. Jane Forbes-Roberts, Richard Furst and M. Ozog for the respondent.*

DECISION OF THE BOARD; January 21, 1982

1. By decision dated July 8, 1981 in this application for certification, the Board directed that a pre-hearing representation vote be taken in the voting constituency specified in that decision. Pursuant to that direction, a vote was taken on July 24, 1981 in which 20 ballots were marked in favour of the applicant, 20 ballots were marked against the applicant, and four ballots were segregated and not counted. By decision dated October 29, 1981, (reported in [1981] OLRB Rep. Oct. 1471) the majority of this panel (with Board Member Bell dissenting) ruled that only one of the four employees whose ballots had been segregated was eligible to vote and directed that another representation vote be taken of the employees in the following bargaining unit (which the Board had found earlier in that decision to be appropriate for collective bargaining):

“all employees of the respondent engaged in pipe inspection, working at or out of the respondent’s premises at Welland, Ontario, save and except foremen, those above the rank of foreman, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.”

In accordance with its normal practice, the Board’s direction concerning eligibility to vote (in the second representation vote) was as follows:

“All employees of the respondent in the bargaining unit on the date hereof [October 29, 1981] who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.”

2. One of the three individuals who were found by the Board to be ineligible to vote in the July 24, 1981 representation vote subsequently applied through counsel for reconsideration of that decision. His counsel also requested that the Board not proceed with the (second) representation vote or that, if the Board wished to proceed with the representation vote, the ballot box be sealed pending a decision of the Board with respect to the outstanding request for reconsideration. The Board determined that the representation vote should proceed but directed that the ballot box be sealed. By decision dated January 20, 1982 that application for reconsideration was dismissed.

3. By letter dated November 27, 1981, the Registrar advised the parties as follows:

"Having regard to the agreement of the parties, this will confirm that the representation vote recently directed by the Board will be held on Friday, December 11, 1981, from 6:15 A.M. to 7:00 A.M. and from 2:15 P.M. to 3:00 P.M., the polling booth to be located in Rose Villa Motel, Riverside Drive, Welland, Ontario.

Four Notices of Taking of Vote and four copies of the voters' list are to be posted immediately by the employer in such conspicuous location that they may be seen and read by all eligible voters, and I would draw your attention to the fact that the Notice contains the following statement:

'I direct all interested persons to refrain and desist from propoganda and electioneering from midnight of Monday, December 7th, 1981, until the vote is taken.'

The required ballots will be furnished by the Board's Returning Officer at the opening of the poll."

4. On the day before the vote, the Registrar received the following letter dated December 10, 1981 from J. D. Carrier of counsel for the respondent:

"Further to our telephone conversation of today's date I wish to confirm the following:

1. Due to the completion of a contract at the Stelco plant in Welland, that Company (Stelco) is winding down production.
2. We understand that that has resulted in a mass lay-off of Stelco employees.
3. The completion of our client's contract in the Stelco plant coincidentally [sic] has resulted in the lay off, as of today's date, of a great number of SGS employees as their tasks have now been completed.
4. Since these employees of SGS are hired for a definite task and that task has been completed it follows that their services have been terminated.

In these circumstances it is our recommendation that the ballots of those employees who were terminated today but who appear and vote tomorrow be segregated. This would be in keeping with the Board's order that persons terminated since the date of preparation of the list would not be entitled to vote."

5. At the December 11, 1981 representation vote, ballots were cast by 44 persons; 27 of those ballots were segregated as they were cast by persons on the voters' list who had been laid off on the previous day. A ballot cast by a person whose name did not appear on the voters' list was also segregated. Upon completion of the voting, the ballot box was sealed as directed by the Board.

6. The applicant's response to Mr. Carrier's letter of December 10, 1981 is contained in the following letter dated December 15, 1981 that was sent to the Registrar by Val Bjarnason, Secretary-Treasurer of the applicant:

"I am writing in reply to your letter dated December 11 in the above matter, with which you enclose a letter from the counsel for the Respondent, requesting segregation of ballots. We wish to protest the segregation of some two-thirds of all ballots cast simply on the basis of a letter delivered to your office at 4:45 p.m. the day prior to the vote.

The instructions for the holding of the vote were very clear and specific, especially as to eligibility for voting, namely, 'all employees . . . who have not voluntarily terminated their employment or who have not been discharged for cause. . . .' Nowhere in his letter of December 10, 1981 does Company Counsel claim that any employees either voluntarily terminated their employment or were discharged for cause. On the contrary he admits that the situation 'resulted in the lay-off, as of today's date, of a great number of SGS employees. . . ."

This frivolous last minute intervention by the Company Counsel has resulted in a further delay in the certification proceedings. We are protesting the decision to allow the segregation under such obviously unjustified reasons in the hope that orders will be issued to prevent repetitions of this abuse of the employees' rights under the Act.

We urge the Board to open the ballot box without further delay and proceed with the counting of all ballots cast."

7. In view of the dispute between the parties with respect to the segregated ballots, a hearing was scheduled on January 8, 1982 for the purpose of considering the representations of the parties with respect to the representation vote taken on December 11, 1981. The parties were also afforded an opportunity to adduce evidence at that hearing with respect to the eligibility to vote of the persons whose ballots were segregated, but they declined to do so. Accordingly, the Board will dispose of his matter on the basis of the undisputed representations of fact included in the submissions that were presented to the Board by the respective representatives of the parties.

8. The respondent is one of the four major employers in the pipe inspection industry. It provides pipe inspection services to various customers; for example, it has a contract with a company known as "Trans Canada" pursuant to which it inspects pipe that is being produced for that customer by Stelco. To perform this function, the respondent sends highly skilled employees to the Stelco plant at which the pipe is being produced. Since the respondent's manpower requirements vary from week to week and month to month depending upon its customers' demand for pipe inspection services, the size of the respondent's active work force fluctuates. Counsel for the respondent submitted that employees are hired by the respondent for a definite term or task, upon the completion of which they are terminated; however, that contention was disputed by the applicant and in the absence of any evidence with respect to the matter, the Board is unable to find that submission to have been duly established. Nevertheless, it is clear that, as in the construction industry, some employees in the pipe testing

industry work for more than one employer during the course of a year, depending upon which of the employers in the industry have need for their services. Some of the employees who are "laid off" by the respondent are subsequently "recalled" or "rehired" by the respondent if management "likes their work". However, some of the employees who are laid off do not return to work for the respondent; some do not accept the respondent's offer of further work because they have found alternate employment; others are never offered further work because of the respondent's dissatisfaction with their work. It was not disputed that the lay-off of 31 employees by the respondent on December 10, 1981 was occasioned by the completion of certain testing work that the respondent had been performing for a customer at Stelco. There was no suggestion by the applicant that the lay-off was in any way improper. The employees were not given any notice of lay-off or pay in lieu of notice. It was the respondent's position that the absence of such notice or pay in lieu of notice did not indicate that it was a "short-term lay-off" as contended by the applicant, but rather merely reflected the inapplicability of notice requirements to persons employed for a definite term or task. However, in the absence of any evidence concerning the pertinent terms and conditions of employment of the individuals in question, the lack of such notice or pay in lieu of notice does not assist us in resolving the issue of their eligibility to vote on December 11, 1981.

9. By the date of the hearing (January 8, 1982), ten of the employees who were laid off on December 10, 1981 had returned to work for the respondent (namely, J. Collins, M. Dagenais, E. Hemmingsen, J. Latinovich, O. McCombs, J. Noxel, G. Oliver, J. Oliver, and J. Rappattoni). The respondent also anticipated that a further employee (S. Atkinson) would return to work on Monday, January 11, 1982. However, the respondent had also employed six "new hires" after the date of the lay-off. The existence of those "new hires" lends some weight to the respondent's contention that not all of the employees who were laid off on December 10, 1981 would ultimately return to work for the respondent. It was not suggested by the applicant that the respondent's failure to "recall" or "rehire" persons laid off on December 10, 1981 instead of employing "new hires" was in any way improper. However, the respondent did not dispute the applicant's contention that the respondent was aware at the time of the lay-off in question that a number of the laid off employees would be needed to perform testing work in another part of the Stelco plant later that month. Moreover, seven of those employees had returned to work for the respondent by December 21, 1981, less than two weeks after their lay-off.

10. In *London District Crippled Children's Treatment Centre*, [1980] OLRB Rep. Apr. 461, the Board was presented with the argument that an employee who has indicated an intention to leave the work place should not be entitled to cast a ballot in a representation vote. Although the specific ruling made in that case (namely, that the employee in question was eligible to vote) does not assist the Board in resolving the matter in dispute in the present case, the following review of the Board's jurisprudence contained in that case and the Board's observations with respect to that jurisprudence provide a useful description of the context in which this issue arises and the Board's general approach to such matters:

"15. Certification is the primary process in *The Labour Relations Act*. It is the means by which the wishes of employees for representation are transformed into the affirmative right to a union to bargain collectively on their behalf with their employer. Generally, apart from exceptional cases involving extreme unfair labour practices, certification is accomplished by an application of majoritarian principles. A union can

be certified by demonstrating support in excess of 55% of the bargaining unit through membership cards. It can also be certified by obtaining a simple majority of the ballots cast in a representation vote. These are the two normal routes to certification under the Act. Both of these procedures require the application of percentages to a defined number of employees. Because employees may continuously come and go through hiring, lay-offs, leaves of absence, quitting and discharge, the Board has had to devise some general rules to apply in order to fix a clear and stable figure of employees in a given bargaining unit for the purposes of an application for certification.

16. There are a number of ready illustrations of those rules. The Board has devised, for example, a 'terminal date' as a cut off point for assessing the number of membership cards filed by a union and statements in opposition to certification filed by employees. The Board refers to the date that an application is filed for assessing the number of employees in the bargaining unit. (See *R. v. OLRB, EX parte Hannigan*, [1967] 2 O.R. 469 (C.A.)). And it has developed a 'thirty day rule' to determine whether an employee absent on the date of application is to be counted within the bargaining unit for the purposes of the application (*Amplifone Canada Ltd.*, [1967] OLRB Rep. Dec. 840). The Board has also evolved 'a seven week rule' as a rule of thumb to assess which employees will be viewed as full-time and which as part-time for the purposes of an application. (*Sydenham District Hospital*, [1967] OLRB Rep. May 135). These are procedural constructs whose application may mean victory or defeat for either party in any particular application. If all of the lines established by these rules were to be redrawn on a case by case basis the certification process would come to a standstill. These established principles are known to the labour relations community and parties coming before the Board can plan on the basis of them. While none of the above rules are entirely inflexible, there is a substantial onus on any party who seeks to have the Board depart from them in a particular case. (*Trenton Memorial Hospital*, [1980] OLRB Rep. Jan. 116).

17. The line which the Board has traditionally drawn respecting the eligibility of employees to vote, namely that the employee be in the bargaining unit both on the date that the vote is ordered (or on the terminal date in a pre-hearing vote or as otherwise agreed by the parties) and on the date the vote is taken, is clear and well known through the Board's published decisions, its practice notes (see Practice Note No. 9, August 1964) and its layman's handbook. While originally the Board merely stated that employees in the bargaining unit would be entitled to vote (see e.g., *The Borden Co. Ltd.*, (1946) CLLC ¶16,461) it evolved the two-pronged eligibility rule to give greater clarity and certainty to voter's lists, as well as to eliminate the possibility of an employer influencing the outcome of a vote by hiring new employees. The Board's practice and the principles underlying it were well canvassed in *J. McLeod & Sons Ltd.*, [1970] OLRB Rep. Feb. 1316.

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19. The Board's past decisions give considerable guidance in the application of the rules regarding the eligibility of employees to vote in the selection of a bargaining agent. Employees on lay-off without a definite date of recall have been held ineligible to vote (*Rix Athabasca Uranium Mine Limited*, [1961] OLRB Rep. July 127). The Board has found that a person who was an employee in the bargaining unit on the date the vote was ordered and was promoted to acting foreman on the date the vote was taken was ineligible to cast a ballot, notwithstanding that he later returned to the bargaining unit (*Success Display Limited*, [1971] OLRB Rep. Oct. 636). An employee who was absent on Workmen's Compensation on the date the vote was ordered and on the date the vote was taken, but who had neither quit nor been terminated was found eligible to vote (*Alex's Plumbing and Heating Limited*, [1970] OLRB Rep. Feb. 1321). Where, on the other hand, an employee who was absent due to illness had been treated in all respects as terminated and had no real prospect of returning to work, the Board concluded that he was not eligible to vote (*Canac Kitchens Ltd.*, [1978] OLRB Rep. Aug. 723).

20. The Board's rule respecting eligibility to vote has sought to strike a balance. On the one hand the Board recognizes the interest of employees with a stake in future collective bargaining having a controlling voice in the choice of a bargaining agent. On the other hand it faces the necessity of establishing a democratic process with some finality in situations where employees are subject to varying degrees of turnover. From the Board's earliest days employees were not removed from the voter's list unless they had left their employment before the taking of the vote. The only recorded exception to this appears to have been in wartime: under P.C. 1003, the *Wartime Labour Relations Regulations*, the Board's practice was to exclude from voting eligibility an employee who prior to the taking of the vote had obtained a separation notice pursuant to Selective Service Regulations. An employee subject to that irrevocable step was viewed as no longer sufficiently interested in employment relations in the plant to be entitled to influence the outcome. (*Packard Electric Co. Ltd.*, 46 CLLC ¶16,424). There appears to be no other recorded variation from the Board's rules.

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21. The Board's voter eligibility rules are not intended and do not purport to achieve a standard of perfect decimal point democracy, assuming such a standard can ever be achieved. The rules seek nothing more than to establish a substantially representative group of employees with a minimum of employment continuity for the purposes of certification. Any deliberate attempt to manipulate the eligibility rules and temporarily 'pack' the voting constituency to influence the outcome of the vote can be dealt with through the Board's remedial authority in unfair labour practices (see, e.g. *Custom Aggregates*, [1978] OLRB Rep. Mar. 215). Any distortion in the selection process caused by a planned and *bona fide* substantial increase in the size of the bargaining unit

in the near future can be accommodated by the application of the Board's build-up principles (*Emil Frant* 57 CLLC ¶18,057; *McCord Corporation* [1965] OLRB Rep. June 203; *Domco Foodservices Limited*, [1980] OLRB Rep. Jan. 33). While the Board deals with these kinds of substantial changes in the bargaining unit, it cannot concern itself with the inevitable fact that some employees who are eligible to vote may have a more temporary or transitory interest in their jobs than others.

23. The selection of a bargaining agent under the Act cannot be conducted on the basis of an ongoing referendum geared to the daily, weekly or monthly changes in the people who make up a bargaining unit. But bargaining rights are not necessarily permanent, and the Act allows for shifts in the wishes of employees whether through the turnover of personnel or otherwise. Any changes in the sentiment of a majority of the employees about union representation over time can be dealt with through the provisions of the Act for the termination of bargaining rights."

As noted in that decision, the Board has generally found employees on indefinite lay-off to be ineligible to vote. As stated in *Canadian Westinghouse Company Limited*, [1966] OLRB Rep. Sept. 372, at paragraph 6:

"The Board's standard direction for the taking of a representation vote, as quoted above, cites only two instances in which a person who was an employee in the bargaining unit on the date the vote was directed forfeits his eligibility to vote, namely, where he voluntarily terminates his employment or is discharged for cause before the date the vote is taken. The Board, however, has not attempted in its standard direction to define exhaustively all of the contingencies under which a person who was an employee in the bargaining unit when the vote was directed would cease to be eligible to vote. The Board has consistently interpreted its direction to mean that a person who, between the date of the direction and the date of the vote, has ceased to be a member of the bargaining unit, is disqualified from participating in the vote, whether because of voluntary termination of employment, discharge for cause, *indefinite lay-off in some circumstances*, or transfer to a position out of the bargaining unit. Stated another way, the policy of the Board is that a person must be an employee in the bargaining unit both on the date the vote is directed and on the date of the taking of the vote in order to be eligible to cast a ballot. . . ."

(emphasis added)

(See also *Fleron Lumber Company Limited*, [1970] OLRB Rep. Nov. 820; *E. H. Ferree Company Limited*, [1967] OLRB Rep. Feb. 867; and *Rix-Athabasca Uranium Mines Limited*, [1961] OLRB Rep. June 127. See also, generally, *Beef Terminal (1979) Limited*, [1981] OLRB Rep. March 244; *Trenton Memorial Hospital*, [1980] OLRB Rep. May 805; and *The Regional Municipality of Durham*, [1980] OLRB Rep. Jan. 80.) However, the absence of

a definite recall date is not, by itself, fatal to a person's eligibility to vote, as indicated by the following passage from *Canac Kitchens Ltd.*, [1978] OLRB Rep. Aug. 723, at paragraph 4:

"In determining the eligibility to vote of a person who is not actually at work (in this case of the date agreed upon by the parties) the Board has regard to the continuance of the employment relationship. In this connection, it is well established that persons on indefinite layoff are not permitted to cast ballots in representation proceedings. As was stated in *Custom Aggregates*, [1978] OLRB Rep. March 215, the Board has taken the view that it would be unfair to allow persons whose prospects for continued employment are so uncertain to participate in the selection or rejection of a bargaining agent. Although the absence of a definite recall date is not, by itself, fatal to a person's eligibility to vote, where, as here, there is no evidence to suggest that, on the date agreed upon by the parties, there was an expectation that the employee would be recalled, the Board will conclude that the layoff was for an indefinite period. . . ."

11. In the present case, the fact that many of the laid off employees appeared at the polling place and cast a ballot indicates that they considered themselves to be employees in the bargaining unit despite the lay-off (see *Sinclair's Restaurant (Atikokan) Ltd.*, [1969] OLRB Rep. Sept. 765). Moreover, the fact that a number of them had returned to work within eleven days after the lay-off provides a further indication that the prospects for continued employment of at least some of the laid off employees were not so uncertain as to render it unfair for them to participate in the selection or rejection of a bargaining agent. However, the fact that the respondent employed a number of "new hires" subsequent to the lay-off without "recalling" or "rehiring" all of the persons who had been laid off on December 10th provides some indication that the prospects of continued employment with the respondent for some of the laid off employees were at best quite uncertain.

12. The Board is of the view that it would be inappropriate to count the ballots cast by all of the persons who were laid off by the respondent on December 10, 1981 since this would allow some persons whose prospects for continued employment were quite tenuous, to participate in the selection or rejection of the applicant. However, we are also of the view that it would be unfair to disenfranchise those individuals who, at the time of the vote, had substantial and legitimate expectations of being recalled in the near future. Therefore, having regard to all of the circumstances of this rather unique case, the Board directs that the segregated ballots cast by the following 11 persons be counted along with the 16 ballots that were not segregated: S. Atkinson, J. Collins, M. Dagenais, E. Hemmingsen, J. Latinovich, O. McCombs, J. Noxel, G. Oliver, J. Oliver, J. Rapattoni, and H. Teutenberg. The other 17 segregated ballots are not to be counted since the persons who cast those ballots were not eligible to vote.

13. The matter is referred to the Registrar.

1621-81-U Gurnam Dhanota, Complainant, v. International Union United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.) Local Union No. 1285, Respondent, v. **Sheller-Globe of Canada, Ltd.**, Intervener.

Duty of Fair Representation – Practice and Procedure – Unfair Labour Practice – Extreme delay in filing complaint – Whether delay by counsel attributed to complainant – Whether extreme delay causing dismissal

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members F. W. Murray and B. L. Armstrong.

APPEARANCES: *Charles Roach, Gurnam Dhanota, Nasib Nanvan, Mohinder Singh Dhanota and Jaswant Vanvat for the complainant; Robert Pattison, Terence Gorman and Joseph C. Maloney for the respondent; J. R. Hassell and P. Jovanovich for the intervener.*

DECISION OF THE BOARD; January 26, 1982

1. This is a complaint under section 89 of the *Labour Relations Act*, alleging a violation of section 68 of the Act on the part of the respondent trade union. Section 68 provides:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

2. The complainant, Gurnam Dhanota, had been an employee of the intervener, Sheller-Globe of Canada, Ltd., and as such had been a member of a bargaining unit represented by the respondent. On or about March 8, 1979, the complainant was discharged. Her complaint alleges that the respondent violated the provisions of section 68 of the Act when it refused to grieve her discharge. The present complaint was not filed, however, until October 27, 1981, some two years and seven months after the discharge in question. The complainant now seeks an order from the Board requiring the respondent to follow through on its duty of fair representation and obtain some sort of third-party adjudication of her grievance, so that she can achieve reinstatement (and whatever other relief is appropriate) from the intervener.

3. Both the respondent and the intervener take the position that the Board ought to refuse to entertain the present complaint, given the extreme delay on the part of the complainant in filing it. Both claimed prejudice if the matter had to be inquired into after the passage of so lengthy a period of time, and submitted that as a matter of labour-relations policy, the Board ought not to countenance a delay of this magnitude. In the circumstances, the Board ruled that it would first entertain the evidence of the complainant with respect to the issue of delay, prior to inquiring into the merits of the complaint.

4. The evidence establishes that the complainant and her husband, who acts as her interpreter, attended at the office of the intervener's Personnel Manager on the day they

learned of her discharge. The Personnel Manager indicated she would not be taken back, as she had been warned three times, including a three-day suspension only the day before. The complainant's husband, Singh Dhanota, stated that the complainant's foreman had been discriminating against her, and that they wanted to file a grievance. The Personnel Manager then told them to go outside and file their grievance with the union.

5. Mr. Dhanota approached the respondent's Plant Chairman, Bob Pattison, who had attended the suspension meeting with the complainant the day before, and told him that the complainant had just been fired. Mr. Pattison responded: "I know". Mr. Dhanota indicated that his wife wished to file a grievance, but Mr. Pattison answered that there was no ground for filing a grievance. The next day, Mr. Dhanota phoned Terry Gorman, the Union President, and explained what had happened. Mr. Gorman was not familiar with the matter, but said that he would talk to Bob Pattison and the steward, who would take the grievance. Nothing more came of it, however. Mr. Dhanota works with Mr. Pattison, and asked him every day for a week about the grievance. Finally Mr. Dhanota told Mr. Pattison that he was going to a lawyer to ask him to file a grievance for them.

6. The complainant and her husband did, in fact, retain a lawyer, a Mr. Philp. They were referred to him by the complainant's brother, who was assisting the complainant as well at this time, and who explained to the Board that he was an engineer with Atomic Energy of Canada, and possessed a certain degree of knowledge of employer-employee relations. Mr. Philp advised the complainant that it was best to write to the union and again request them to take up a grievance on her behalf, and Mr. Philp did so on March 23rd. The union, through Mr. Gorman, responded by letter of March 26, 1979, which read:

Dear Mr. Philp:

Your letter concerning Mrs. Gurnam Dhanota and her discharge from the employment of Sheller Globe of Canada Limited was received in this office on Friday, March 23, 1979.

Under the collective agreement I as President of the Local Union do not have the right to file a grievance for an employee. I have spoken with the Chairperson representing the Union in that plant, Mr. R. Pattison, who informs me that he met with the Committeeperson, Connie Reid, for the area in which Mrs. Dhanota worked during her employment with Sheller Globe, and following an investigation by the two committee-people mentioned it was determined that there was no grounds for a grievance.

However, my understanding is that an employee can file a grievance if he or she chooses.

Yours truly,

Mr. Philp then wrote a further letter to Bob Pattison, dated April 5, 1979, as follows:

Dear Sir:

Re: Gurnam Dhanota

I act for Mrs. Gurnam Dhanota and enclose copy of letter I wrote to Mr. Gorman and a copy of his reply.

Despite the Union's reluctance to proceed by way of grievance procedure, my client has instructed me to have the grievance procedures instituted and I am advised that you can take and will take the necessary steps so to do.

Yours very truly,

There was no response to Mr. Philp's letter. The union never did agree to take up the complainant's grievance, and no further action was taken by either the complainant or the union with respect to a grievance.

7. Mr. Philp then suggested that since the union was doing nothing for the complainant, the complainant could go to the Human Rights Commission on her own. He explained that that would be a lot cheaper than paying him to go against the union and the company. The complainant took his advice, and filed two complaints with the Human Rights Commission. Both complaints were directed against the company, and neither mentioned the union. The complainant and her husband explained the full history of the case to the investigating officer, including the union's refusal to file a grievance, and left the matter in the Commission's hands. This was in 1979. On October 22, 1980, the Commission wrote to the complainant that it had fully investigated her complaints and found no evidence to support her claim of discrimination. The Commission added, erroneously, that the company had closed down, which did little to enhance the Commission's credibility in the eyes of the complainant.

8. In any event, the complainant and her husband went back to see Mr. Philp over this development. Mr. Philp stated that the complainant had a good case, and advised that he would commence a law suit against the company in the Courts. A wrongful dismissal action was commenced in the County Court in December of 1980. On February 2, 1981, the employer's solicitors filed a statement of defence in which they disputed the jurisdiction of the County Court on the grounds of the amount of monetary relief sought, and, more importantly, on the ground that the Courts lacked jurisdiction entirely, because the discharge was one covered by the terms of a collective agreement. Mr. Philp's only response was to *praecipe* the action into the Supreme Court of Ontario, where the matter sat for a further number of months.

9. In October 1981, Mr. Philp telephoned the complainant's husband and advised him that he had been in error in trying to take the matter into the Courts, and that the complainant ought to go to the Labour Board. The complainant then came in contact with her present solicitor, who filed this complaint at once.

10. The complainant and her husband point out that they were at all times trying to pursue the matter of the complainant's discharge, and that they trusted first the Human Rights

Commission, and then Mr. Philp, their lawyer. The complainant's husband indicates that he continued during this period to speak to Mr. Pattison from time to time about the progress of his matter with the Human Rights Commission and in the Courts. He added that the two stewards who had been involved continued as well to express an interest in his problem, and would ask him on occasion how his case was going.

11. Counsel for the complainant notes further that neither the respondent nor the intervener put forward any evidence of prejudice, and that the intervener in particular has preserved the particulars of its defence in the Statement of Defence filed in the Courts. Counsel adds that the company's defence is the union's defence, since the union is relying on the defence that no grievance was justified at the time. He argues that both Mr. Pattison and the stewards were kept apprised of the fact that the complainant's discharge was still being challenged, and that there could not therefore have been any "surprise" when the present complaint was filed. Counsel points out that the Human Rights Commission is housed in the same building as the Labour Board, and that Mr. Philp, in sending the complainant to the Human Rights Commission "reasonably would have expected that Commission to advise Mrs. Dhanota of any remedies they or the Ontario Labour Relations Board were able to assist her with". Finally, counsel points out that an arbitrator would ultimately have the power to decide that relief would be appropriate for the complainant, in the light of any unreasonable delay on her part. On the issue of the complainant's right under the collective agreement to file a grievance on her own, counsel for the complainant argues that the union's letter of March 26, 1979, in that regard was too vague, and that in any event the union's construction of the collective agreement was not correct.

12. The Board finds none of the complainant's submissions to be tenable on the present facts. To begin with, to argue some two-and-a-half years later that the respondent may have been mistaken in its construction of the collective agreement over the complainant's right to grieve is to misconceive the issue now before the Board. The letter of March 26th did clearly draw the complainant's attention to the fact that the complainant had the right to file a grievance on her own, if she still wished to do so. This was only after the respondent had itself investigated the discharge, and advised that it did not consider grounds for a grievance to exist. The complainant at that stage took no steps to attempt to file her own grievance, nor request from the respondent (who at no time was being hostile toward the complainant) further elucidation of her rights, if that was necessary. Rather, the complainant, after the letter from her solicitor of April 5th, appears to have let the matter of a grievance drop entirely, choosing instead to pursue her remedies against the company in other forms. The evidence of the complainant's husband is equivocal as to the extent they were made aware by Mr. Philp in April of 1979 of the availability of a section 68 proceeding before the Labour Board. But even if the complainant was not made aware of that, the respondent is not to be made responsible for any omissions on the part of the complainant's own agent; cf. *Addressograph — Multigraph of Canada Limited*, [1968] OLRB Rep. March 1183; *Canadian Union of General Employees*, [1975] OLRB Rep. April 320; *Adventure Construction Limited*, [1975] OLRB Rep. April 371. Nor was the complainant or her solicitor entitled to rely on the offices of the Human Rights Commission to provide the complainant with legal advice as to possible avenues of redress outside of their own forum.

13. A delay of the present magnitude carries with it an element of prejudice which is undeniable. Memories fade, and a party's ability to present a defence will deteriorate for that reason alone. This is particularly true when a party is not on notice that an action against it,

requiring the litigation of certain events, remains pending. Here the respondent was justifiably under the impression that the grievance route, or any further demands against the union, had been abandoned in favour of other actions against the company. The lingering discussions which the complainant's husband had with Mr. Pattison and the stewards were clearly of an amicable nature; they provided no indication that action would subsequently be directed against the trade union itself, so that notes or other forms of evidence could be more actively maintained. The defence of the employer is *not* the defence of the trade union in these proceedings. The Board would be concerned not with the matter of cause for discharge, but rather the steps which the respondent's officials went through in concluding in their own minds that no grounds for a grievance existed. That defence would turn upon the recollections and credibility of the respondent's own officials. It might be noted parenthetically that the Labour Board, in administering the *Labour Relations Act*, is primarily concerned with the ongoing labour relations of a workplace, and such workplaces do not remain static over time. The Board as a result has always been conscious of the need for expedition in its practices and procedures. The delay in the present case raises concerns over an appropriate remedy, if the Board were to permit this complaint to now proceed, which are not fully answered by the complainant's concession as to damages. In circumstances such as the present, the onus shifts to a complainant to satisfy the Board that there are compelling labour relations reasons to cause the Board to exercise its discretion and entertain the complaint under section 89.

14. The Board in *CCH Canadian Limited*, [1977] OLRB Rep. June 351, stated:

3. The Board as a general rule will not refuse to entertain a complaint under section 79 only because of a delay in lodging the complaint. Where unreasonable delay has occurred, the Board in most cases will simply take this factor into account in assessing any compensation which might be awarded. In the instant case, however, we are of the view that because of the extreme delay in the filing of the complaint and, in the circumstance the lack of any mitigating factors which might justify or excuse such a delay, the Board should exercise its discretion under section 79 of the Act and refrain from inquiring into the complaint.

In a similar vein, see *Concrete Construction Supplies*, [1979] OLRB Rep. Aug. 739. In *Irving Posluns Sportswear*, [1979] OLRB Rep. Oct. 986, the Board found an almost three-year delay in filing a section 68 application with respect to the non-payment of certain monies to be "extreme", and refused to entertain that portion of the complaint.

15. In the present case, the delay has indeed been "extreme", and the factors put forward by the complainant are insufficient to deliver her from the consequences of that delay. Certainly the Board has no quarrel with the notion of an aggrieved individual investigating other avenues of redress prior to launching a section 68 application with the Board. But a point is reached, after a reasonable period of time, when the individual must decide whether it is going to go against the trade union or not, and if so, then overt steps must be taken in that direction. The individual cannot rely indefinitely on the efforts being taken on his or her behalf in other directions, and then come back against the trade union when those efforts prove fruitless. The important point to note here is that the other forms of action being pursued by the complainant were directed solely against the employer. Not a word was said to the trade union during that period to indicate that its conduct was being viewed as unlawful, or that its

own position might still be placed in jeopardy. The complainant will not now be permitted, at this late date, to use section 68 against the trade union as a last resort to reach the employer.

16. For the foregoing reasons, the Board exercises its discretion under section 89 of the Act and declines to inquire further into the complaint. The complaint is accordingly dismissed.

1716-81-R Teamsters' Local Union No. 230 Ready Mix Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers, Applicant, v. Simcoe Block (1979) Limited, and Dufferin Materials & Construction Limited, Respondents.

Sale of a Business – Whether sale of business as going concern or of assets only – Whether shut-down and major renovation plans by successor relevant – Whether employees intermingled – Board amending bargaining unit under section 63(6)(d)

BEFORE: D. E. Franks, Vice-Chairman, and Board Members H. J. F. Ade and S. Cooke.

APPEARANCES: *B. W. Adams and C. Picard for the applicant; James B. Noonan, Raymond J. Gariepy and Richard Orzy for Simcoe Block (1979) Limited; J. E. Harris, Q.C. and A. D. Nordstrum for Dufferin Materials & Construction Limited.*

DECISION OF THE BOARD; January 19, 1982

1. This is an application under section 63 of the Act wherein the applicant alleges that there has been a sale of a business from Dufferin Materials & Construction Limited (hereinafter referred to as "Dufferin") to Simcoe Block (1979) Limited (hereinafter referred to as "Simcoe"). The applicant and the respondent Dufferin are parties to a collective agreement effective February 1, 1979 running to January 31, 1982.

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3. The respondent Simcoe operates a block manufacturing and supply business in the city of Barrie located at 113 Tiffin Street. Simcoe has operated on the site for approximately 12 years and the site consists of a scattered number of parcels of land along Tiffin Street on which Simcoe operates its business. The respondent Dufferin also operated a block plant and building materials business at 207 Tiffin Street in Barrie. That site was a six and a half acre site containing amongst other things, a block plant and storage yards as well as an office building. For a number of years the two businesses competed, primarily in the Barrie area, in the business of selling concrete blocks. It appears, however, that sometime in 1981 Dufferin made a decision to divest itself in the block making operation in Barrie. The evidence of Mr. Gariepy, the president of Simcoe, is that this afforded him an opportunity to purchase a site where he could integrate his operations.

4. On October 28, 1981 an agreement of purchase and sale was executed by Simcoe

Block (1979) Limited and Dufferin Materials and Construction Limited. That agreement of purchase and sale sets out the assets to be transferred between the two respondents. These include the parcel of land referred to above, plus the plant and equipment on the land and the buildings, together with all maintenance supplies, tools and spare parts on the site at closing and certain mobile equipment described in an attached exhibit to the agreement of purchase and sale. The agreement also includes a non-competition covenant in which Dufferin agreed not to go into the block business in a certain area for a period of 10 years and Simcoe agreed not to go into the ready-mix concrete business in the same area for the same term. In addition, Simcoe also agreed that in the future it would purchase not less than 70 per cent of the cement requirements of Simcoe from the St. Lawrence Cement Company for a period of 10 years. In addition, Dufferin agreed to supply Simcoe with customer lists and files. The agreement of course also contained a number of clauses dealing with the details of the sale until closing, which are not material to the present application.

5. The actual transfer took place on October 30th and the various documents and covenants as required by the terms of the contract were transferred, although it appears as though certain letters of introduction to customers were not executed by Dufferin in favour of Simcoe. It appears that shortly after the sale, Simcoe closed down the block plant operation and there is some dispute as to whether Simcoe is in the process of repairing the block plant operation. On the other hand, Simcoe has sold off certain inventory which was part of the assets purchased from Dufferin under the agreement.

6. The position taken by the applicant in this matter is that the transaction taken as a whole is clearly a sale of a business from Dufferin to Simcoe and that notwithstanding the fact that the employees have been laid off by Simcoe's subsequent closing down of the operation, section 63 ought to operate to make Simcoe the party to the collective agreement which previously existed between the applicant and Dufferin. In this regard the applicant argues that whatever plans Simcoe may have for the business that was bought concerning modifying, improving or even moving the operation, this is irrelevant since it was the business carried on by Dufferin that was sold and not simply, for instance, certain assets.

7. The respondent argues that the transaction between Simcoe and Dufferin was nothing more than a sale of an asset and emphasizes that there was no direct transfer of goodwill in the agreement of purchase and sale. The respondent argues that the transaction between Dufferin and Simco should be characterized as the purchase of a competitor's business and emphasized certain of the Board's cases dealing with what is sometimes referred to as parallel businesses. The cases cited were the *British American Bank Note* case, [1979] OLRB Rep. Feb. 72, *Nor John Construction*, [1978] OLRB Rep. May 438, *Dominion Stores*, [1979] OLRB Rep. July 626, and *Grand Valley Construction*, [1981] OLRB Rep. June 663. In these cases the Board declined to apply section 63 of the Act because it found in the circumstances that there had not been the sale of a business, but merely the acquisition of certain assets of a business by a parallel or competing company. The respondent argues that the present case is clearly an example of this, and Simcoe competed in the same product market, and the transaction should be characterized as Simcoe buying out a competitor in the product market and as a consequence of that buying out of the competitor obtaining certain assets which it intends to use as part of its business.

8. We cannot agree with the respondent's characterization of the above transaction as simply the purchase of assets. Taken as a whole, the transaction involved the purchase of a

business as a going concern. The fact that Simcoe shut it down upon acquisition and intends to make significant and substantial changes in the Dufferin operation, is irrelevant since at the time, what Simcoe purchased was a block manufacturing and building supply business. The cases cited in support of its proposition that this is a parallel business transaction can be clearly distinguished from the present case. In finding that there was an acquisition of the transfer of assets only (in the cases other than the *British American Bank Note* case) the Board was dealing with situations where the business purchased had not been fully operational at the time of the sale. This in turn led to a finding that there had only been a transfer of assets. As noted above, however, the transaction between Dufferin and Simcoe taken as a whole indicates that a business as a going concern was transferred.

9. In view of the foregoing, the Board therefore finds that there has been a sale within the meaning of section 63 of the Act.

10. The collective agreement to which the respondent Dufferin is bound contains the following bargaining unit:

“2.01 The Employer recognizes the Union as the exclusive bargaining agency for all employees employed at or working out of its Block Plant in Barrie, Ontario, save and except foremen, dispatchers, persons above the ranks of foremen and dispatcher, and office and sales staff.”

The employees of the respondent Simcoe are unorganized. The applicant herein is not seeking to extend its bargaining rights to cover the unorganized employees of Simcoe Block. Section 63, subsection 2 reads as follows:

“Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.”

The effect of that section would be that all of the employees of Simcoe Block would be covered by the collective agreement with the applicant.

11. In the present case, however, it appears that immediately after acquiring the new business, Simcoe laid off the previous employees of Dufferin. However, as noted above Simcoe has transported inventory out of the Dufferin premises with its employees. Under these circumstances we are prepared to find that there had been an intermingling of the unorganized employees of Simcoe and the employees covered by the collective agreement. Subsection 6 of section 63 reads as follows:

“Notwithstanding subsections (2) and (3), where a business was sold to a person who carries on one or more other businesses and a trade union or

council of trade unions is the bargaining agent of the employees in any of the businesses and such person intermingles, the employees of one of the businesses with those of another of the businesses, the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (a) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection (2);
- (b) determine whether the employees concerned constitute one or more appropriate bargaining units;
- (c) declare which trade union, trade unions or council of trade unions, if any, shall be the bargaining agent or agents for the employees in such unit or units; and
- (d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement."

In the circumstances of the present case, we are prepared to exercise the power in clause (d) set out above and amend the bargaining unit in the collective agreement so as to limit it to those employees which it previously covered, namely those at the Dufferin operation at 207 Tiffin Street, Barrie, Ontario.

12. Accordingly, the Board declares that the applicant is party to a collective agreement with the respondent, Simcoe Block (1979) Limited terminating on the 31st day of January, 1982. The bargaining unit in such agreement will be for all employees employed at or working out of its Block Plant at 207 Tiffin Street, Barrie, Ontario, save and except foremen, dispatchers, persons above the rank of foreman, dispatcher, office and sales staff.

2090-81-R United Food and Commercial Workers International Union, Local 1000A, AFL-CIO-CLC, Applicant, v. Panache Rotisseurs Inc. operating under the name and style of **St. Hubert Bar-B-Q**, Respondent

Membership Evidence – Petition – Whether membership support must be at least “one full employee” in excess of 55 percent to be entitled to certification without vote – Petition sent by regular mail and received by Board after terminal date untimely

BEFORE: George W. Adams, Q.C., Chairman, and Board Members F.W. Murray and O. Hodges.

***APPEARANCES:** Elizabeth J. Shilton Lennon, Les Dowling, and Carol Gibbons for the applicant; Michael Gordon and Albert Wiltshire for the respondent.*

DECISION OF THE BOARD; January 25, 1982

1. This is an application for certification.
2. The Board finds the applicant to be a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. The applicant seeks certification for two bargaining units which the Board finds to be appropriate for collective bargaining. They are:

Bargaining Unit #1

All employees of the respondent at Brampton, Ontario save and except the manager, assistant manager, dining room manager, persons above those ranks, persons regularly employed for not more than twenty-four hours per week, and students employed the school vacation period.

Bargaining Unit #2

All employees of the respondent at Brampton, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except the manager, assistant manager, dining room manager and persons above those ranks.

4. Counsel for the respondent advised that the respondent received a copy of the application and related documents on January 11, 1982 and that the respondent posted the Notice to Employees at 3:30 p.m. on that same date. The terminal date set for the application was January 14, 1982 and the Notice to Employees advised that all statements of objection by employees must be received by the Board by the terminal date or such statements must be sent by registered mail as of that date. The notice to Employees also advised that the date of hearing set for the application was January 22, 1982.
5. The Board received, on January 18, 1982, an undated hand-printed statement of

desire containing the signatures of nine persons purporting to be employees of the respondent. By letter dated that same date, the Board acknowledged receiving the document; advised that it had been sent by regular mail and received after the terminal date of January 14, 1982; and enclosed a copy of the *Guide to the Labour Relations Act*. No one appeared at the hearing on behalf of the persons who signed the document and, in any event, the document does not constitute a timely statement of desire. Counsel for the respondent agreed that all full-time employees would probably have seen the posted Notice to Employees between January 11 and 14.

6. The Board finds that more than fifty-five per cent of the employees in bargaining unit #1, at the time the application was made, were members of the applicant on January 14, 1982, the terminal date fixed for this application and the date which the Board determines pursuant to section 103(2)(j) of the Act, to be the time for determining membership under section 7(1) of the Act. The parties at the hearing were advised that the precise number of employees in bargaining unit #1 at the time of the application was thirty-nine, and twenty-two of these employees were members of the applicant within the meaning of the Act on January 14, 1982, the terminal date. Accordingly, 56.41 per cent of the employees in the bargaining unit were members of the applicant trade union at the times relevant to the application. Counsel for the respondent submitted that the application was borderline and that, in such circumstances, the Board should exercise its discretion and direct a representation vote. It was suggested that the Board ought to adopt the requirement of "one full employee's support" in excess of 55 per cent as, in counsel's submission, it requires with respect to 50 per cent in the context of a representation vote. We cannot assent to this request nor do we agree that this is the Board's practice with respect to representation votes. The mathematical nature of 50 per cent always results in "one full employee's support" in excess of 50 per cent but beyond the inherent nature of this number, there is no Board practice upon which the respondent can rely. Many applications entertained by the Board only exceed 55 per cent by a fraction of employee support but it is the Board's practice to require circumstances over and above the extent of support in determining whether to exercise the discretion accorded to it. It is our finding that no such circumstances exist in the instant case.

7. A certificate will issue to the applicant for bargaining unit #1.

8. The Board further finds that less than 45 per cent of the employees in bargaining unit #2, at the time the application was made, were members of the applicant on January 14, 1982, the terminal date fixed for this application and the date which the Board determines pursuant to section 103(2)(j) of the Act.

9. The application, insofar as it relates to bargaining unit #2, is dismissed.

2004-81-U Brian Morgan and certain casual employees, Complainant, v. Metropolitan Toronto Civic Employees Union, Local 43 (CUPE), Respondent, v. **Corporation of the City of Toronto**, Intervener.

Duty of Fair Representation – Unfair Labour Practice – Union negotiating restrictions on employment of casual employees – Whether breach of duty of fair representation – Union required to show objective justification where job security of employees affected

BEFORE: M G. Picher, Vice-Chairman.

APPEARANCES: *J. McCartan and B. Morgan for the complainant; G. Charney, S. Kavaesi and J. Mele for the respondent; R. Rae for the intervener.*

DECISION OF THE BOARD; January 14, 1982

1. This is a complaint under section 68 of the *Labour Relations Act*. The complainant, Mr. Brian Morgan, is a casual employee with the City of Toronto. He alleges that the respondent union, which represents both casual and permanent “outside” employees of the City, violated the duty of fair representation under section 68 of the Act in negotiating a change in the collective agreement affecting the job security of casual employees.

2. The evidence establishes that for a number of years the City was allowing the number of permanent positions in the bargaining unit to shrink by attrition, hiring casual employees as replacements. Over the last several years the number of permanent employees has declined from some 2000 to 1500, while there has been a commensurate increase in casual employees. To the extent that casual employees do not receive benefits, there has been an obvious saving to the City. The union, on the other hand, projected that its bargaining unit would be entirely depleted in ten years if the current pattern of attrition continued.

3. In the negotiation of the 1981 collective agreement the union advanced a demand to make all casual employees permanent. When that was rejected by the City, the parties resolved on the following provision in a memorandum of settlement on June 5, 1981:

CASUAL EMPLOYEES

Amend Clause 1 “Bargaining Unit and Definition of Employee” by adding to sub-clause (c) (ii) the following:

“Provided that effective from the first day of the calendar month following ratification of the 1981 Collective Agreement by city Council, any Casual employee hired after said date of ratification shall not be employed for more than two (2) such periods of employment.”

Provide a new sub-clause (iii) to read as follows:

“That a Casual employee shall be employed only for the purpose of accommodating seasonal workload requirements or for replacement of employees absent on account of vacation, illness, accident or leave of absence.”

4. The effect of the article, from the union's viewpoint, is to force the City of make casual employees permanent, since their services, as often experienced employees, would otherwise be lost upon their second layoff. Counsel for the union stresses that previously the casual employees had no job security whatever, it having been established by several boards of arbitration that they could be discharged, laid off and not recalled at will and without recourse to the grievance procedure.

5. The evidence also establishes that all employees in the bargaining unit including casual employees, were provided full copies of the memorandum of settlement, including the article affecting casual employees. They all received, with the same material, full notice of the union ratification meeting and vote held at Massey Hall on Sunday, June 14, 1981. There is no evidence to establish that casual employees did not have notice or the fullest opportunity to participate in the discussion and vote in the ratification of the collective agreement. The agreement was ratified by an 87% majority of some 860 employees voting.

6. When a union takes steps that impact on the job security of a minority of employees it must show some objective justification for its action (see, *B.C. Distillery Company Limited*, [1978] Can. L.R.B.R. 375 at 381). In this case ample justification has been shown. The union faced a continuing erosion of the ranks of permanent employees. The long standing use of casual employees, some of whom were called, laid off and recalled to work regularly for up to seven years, was becoming an increasing problem for the union. Casuals are employees virtually without rights under the collective agreement, save the right to pay union dues and receive the negotiated wage. They enjoy no benefits, seniority or other rights under the agreement. The ascendancy of casual employees was a real and serious threat to the union's interest and to the interest of permanent as well as casual employees who had any aspirations to becoming permanent. In this regard it is significant that some sixty to seventy casual employees have been made permanent since article 22 of the memorandum of agreement came into effect. I am satisfied that the union has established an objective justification for its action.

7. I am also satisfied that there has been no violation of the rights of the casual employees in respect of the procedure followed by the union. Casual employees received the same notice of the ratification meeting as the permanent employees, and the same full disclosure, in advance, of the articles to be discussed. They likewise had the opportunity to inquire as to the meaning of article 22, to speak to it and to vote on its acceptance. I am satisfied on the evidence that there has been no conduct by the union or its officers that is arbitrary, discriminatory or in bad faith.

8. The complaint must therefore be dismissed.

1071-81-U The Amalgamated Clothing and Textile Workers' Union, Complainant, v. Trimarine (Canada) Ltd., Respondent

Discharge for Union Activity – Unfair Labour Practice – Whether lay-off and failure to recall because of anti-union animus – Employer satisfying onus by showing financial circumstances as justification

BEFORE: Ian Springate, Vice-Chairman, and Board Members J. A. Ronson and B. L. Armstrong.

APPEARANCES: *B. W. Adams, C. Clark and M. Robillard for the complainant; W. McNaughton and P. Rossi for the respondent.*

DECISION OF THE BOARD; January 5, 1982

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant alleges that the respondent dealt with the following grievors contrary to section 3, 66, 70 and 79 of the Act, namely:

Mrs. Judy Hollinsky
Miss Linda Rojek
Miss Carol Oriet
Mrs. Victoria Pukay
Mrs. Susham Sood

• • •

3. The respondent, which commenced operations in 1979, makes flotation vests and jackets out of nylon and a lightweight material called "airex". The business is a highly seasonal and competitive one. Mr. Peter Rossi, the respondent's president and part owner, testified that some ninety per cent of all annual orders are placed during the months of January through April for eventual use during the following summer, and that the company must be able to promptly fill orders when they do come in. It should be noted that from the very beginning the respondent appears to have suffered from a lack of financial resources, a problem compounded by the need to build up an inventory prior to the heavy January to April sales period.

4. The complainant was certified to represent the respondent's employees on April 27, 1981. The driving force behind the union's organizing campaign was Mrs. Judy Hollinsky. Mrs. Hollinsky signed eleven of the respondent's fourteen bargaining unit employees into membership in the union. The complainant filed its application for certification on April 3, 1981. The respondent received notice of the application on Friday, April 10th, along with a request from the Board to forward "documents, from among existing employment records, containing signatures of the employees. . .". These sample signatures were to be used to check the signatures on the union's membership evidence. On the afternoon of April 10th, Mr. Rossi held a meeting with all of the respondent's employees. At this meeting, Mr. Rossi indicated that he needed sample signatures to send to the Board and asked that employees sign their time cards for this purpose. Mr. Rossi also indicated that he had a document for employees to sign expressing their faith in the company. At the hearing, counsel for the respondent indicated

that the document in question was meant to be a petition against the union. Mr. Rossi arranged to have a translator at the meeting who could speak to a number of Vietnamese employees in their own language. The Vietnamese were told that there was no need to be afraid of pressure from either the union or the company and that they could do what they wanted. During the course of the meeting, Mrs. Hollinsky stated loudly that none of the employees should sign anything. Only one employee signed the petition and her pay card.

5. Subsequent to the meeting with the employees on April 10th, the respondent posted a notice which read as follows:

“Due to the unexpected delay in our current shipment from our supplier of nylon, we are forced to announce a temporary lay-off effective Monday, April 13, 1981.”

Subsequent to the lay-off most of the respondent's employees were recalled for varying periods of time. None of the grievors were recalled. The complainant contends that the lay-off was prompted by the application for certification, and that the grievors were not recalled due to the fact that they were union supporters. Counsel for the respondent conceded that in the circumstances the timing of the lay-off “looked bad”, but he contended that the timing was coincidental and that the lay-off and subsequent action on the part of the respondent had been motivated strictly by business considerations.

6. The Board heard considerable evidence from the respondent concerning its financial situation and the difficulties it was facing at the relevant time. This evidence was for the most part not challenged by the complainant. This evidence indicates that the respondent had originally projected a heavy sales volume for its 1981 season. This projection was based in large measure on its 1980 sales, which included a sale of some 1,100 units to a Vancouver-based distributor. The same distributor had indicated that in 1981 it would be placing an order of between 1,000 and 1,400 units. The respondent also had discussions with Peter Storm, a well known supplier of marine equipment about supplying the company with vests and jackets bearing the Peter Storm name. These discussions led the respondent to believe that in 1981 Peter Storm would be placing two separate orders of 500 units each. Based on these and other projected sales, the respondent concentrated on building up its inventory to meet the orders expected to be placed between January and April of 1981. However, the result of this inventory build-up was that the respondent found itself in a deteriorating liquidity position. By October 31, 1980 the respondent owed a total of some \$129,000.00.

7. It is not disputed that the 1981 season turned out to be a disaster for the respondent. According to Mr. Rossi this was due in part to a general slump in flotation vests and jacket sales, which caused a large Vancouver manufacturer to “dump” its product on the market well below the price which the respondent could afford to charge. Whatever the reason, it is clear that the respondent's sales were well below projected levels. The Vancouver distributor which had indicated that it would be placing an order of between 1,000 and 1,400 units, did not place its order until May 21, 1981, and then it was only for 97 units. In April an order did come from Peter Storm for 500 units, but with the word that there would not be a second order.

8. As of April 10th the respondent had not yet received even the disappointingly low orders from either Peter Storm or the Vancouver distributor. Instead, it had firm orders for only between 300 and 400 units. The respondent's inventory at this point stood at some 1,100

units, and additional units were being completed at a rate of 40 to 50 per day. By this time the respondent's liquidity problem had, not unexpectedly, become worse, with its debt now totalling some \$199,000.00.

9. The respondent's growing liquidity problem had not gone unnoticed. On April 9, 1981 the bank telephoned Mr. Rossi and advised him that a \$2,000.00 overdraft had arisen with respect to the respondent's account, and that the bank would not tolerate any overdraft. The overdraft was paid off by one of the respondent's other shareholders using his own funds. On April 9th the bank also indicated to Mr. Rossi that it wanted additional guarantees for a loan the respondent had outstanding. During the conversation Mr. Rossi asked if the bank would issue a letter of credit to Consoltex, its supplier of nylon, but the bank refused.

10. Back in October of 1980 the respondent had ordered a total of 5,500 meters of nylon from Consoltex. It appears that originally the end of December 1980 had been set as the delivery date, but that this was later pushed back to April of 1981. About 3:30 p.m. on April 10th, after the meeting with the employees about the union, Mr. Rossi was telephoned by Consoltex and advised that the nylon was ready to be shipped, but the company would not ship the material until the respondent first paid it some \$8,000.00 to cover part of the cost of an earlier shipment, and as advance payment for this shipment. The respondent lacked the funds to make the payment, and at the time was running out of nylon.

11. Mr. Rossi testified that it was his conversations with the bank and Consoltex which prompted him in consultation with the respondent's other shareholders to temporarily lay-off all staff while some decisions were made as to what should be done. It should be noted that on three previous occasions the respondent had laid off all of its employees due to excess inventory, namely on August 27, 1979, December 10, 1979 and July 11, 1980. Following these earlier lay-offs, all of the employees had been recalled.

12. Subsequent to April 10, 1981 the respondent recalled a number of employees for various lengths of time. Mr. Rossi testified that over the weekend following April 10th it was decided to finish off those units which were already near completion. Both Mr. Rossi and Mrs. Eloranta, the respondent's production manager, testified that the decision as to which employees should be recalled was made by Mrs. Eloranta. Mrs. Eloranta testified that initially she recalled three employees who normally did the finishing work. Subsequently, the Peter Storm order came in along with an advance deposit. The existing inventory of finished units did not meet the Peter Storm specifications and accordingly additional employees were recalled to finish off units using nylon purchased with the Peter Storm deposit. The first three employees were recalled on April 14, 1981. One additional employee was recalled on each of April 20th, April 29th, May 6th, May 11th, May 20th and June 3rd. All of these employees were laid off on June 19th. Three employees were subsequently recalled on July 6th, two on July 13th, one on July 16th, another on July 22nd and two on August 4th. By October, the respondent was back down to two employees who were working on jackets and vests which had been left on the floor at the time of the April 10th lay-off. On October 19, 1981 a third employee was recalled. Mrs. Eloranta testified that in deciding on which employees should be recalled during this period, she chose those who were capable of efficiently doing a number of different jobs so as to reduce the number of employees required. It should be noted that on May 6, 1981 Mrs. Jo Anne Kam Kim, Mrs. Hollinsky's sister, who normally sews airex, was recalled to do some sewing work. Mrs. Kim was subsequently recalled for two other periods to do the same type of work. Mrs. Kim was a union supporter.

13. The five grievors were not recalled by the respondent at all after April 10, 1981. On August 4, 1981 they were each forwarded termination pay pursuant to the *Employment Standards Act*. It is the contention of the complainant trade union that this was due to their support for the union.

14. Miss Linda Rojek, Mrs. Victoria Pukay and Mrs. Susham Sood did not testify at the hearing, and no one else presented evidence to indicate that they had been active union supporters. Indeed, in the certification proceedings, the union did not even file a membership card on behalf of Mrs. Sood. Mrs. Eloranta gave uncontradicted testimony that Miss Rojek and Mrs. Sood and Mrs. Pukay each had experience on only one job operation, and further that Mrs. Pukay was a new employee. Miss Oriet did testify. Miss Oriet had worked primarily as an airex cutter, a job which has apparently not been performed since April 10th. Miss Oriet had performed a number of other job functions in which her work quality was highly regarded, but her speed was less than that of other employees. Miss Oriet admitted that her only involvement with the union had been to sign a union card. Because of the widespread support the union enjoyed among the employees, eleven of the fourteen bargaining unit employees having signed union cards, it is clear that most of the employees who were recalled had also been union supporters.

15. This brings us to Mrs. Hollinsky, who signed up the employees into union membership. Mrs. Hollinsky's comments at the meeting on April 10th, would have made it clear to the respondent that she was an active union supporter, and indeed Mr. Rossi acknowledged this to be the case. Mrs. Hollinsky commenced work with the respondent on September 8, 1980. This was the first time she had done this type of work. Mrs. Hollinsky, who primarily worked on waist bands, acknowledged that she had never been fast enough to be paid at the set piece rate basis, but instead had always been paid an hourly rate. Mrs. Hollinsky also acknowledged that there had been complaints about the speed at which she worked. Mrs. Eloranta testified that Mrs. Hollinsky's work needed to be re-done more often than that of any other employee, and estimated that forty per cent of her work had to be re-done.

16. In a complaint such as this, section 89(5) places the onus on the respondent to come forward with a credible explanation for its actions devoid of any anti-union motive. The respondent must prove that it did not violate the Act and in doing so it must establish certain facts on the balance of probabilities. The Board outlined the extent of the onus in *The Barrie Examiner* case [1975] OLRB Rep. Oct. 745, wherein at paragraph 17 the Board stated:

“Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts — first, that the reasons given for the discharge are the only reasons, and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.”

17. One issue in this case is whether the lay-off of all the employees, including the grievors, announced April 10, 1981 was the result of the respondent learning of the complainant's application for certification earlier in the day. The timing of the announcement of the lay-off certainly adds weight to the allegation. On the other hand there is no question as to the seriousness of the respondent's situation, as its inventory and debts mounted and

projected sales failed to materialize. Indeed, one would have thought that long before April 10th the respondent would have re-assessed its situation, and concluded that production should be cut back. As it was, the respondent appears to have faced reality only when forced to do so by the phone call from the bank and later the call from Consoltex demanding payment in advance for needed materials. Against this background the drastic action of laying off all employees until some decisions could be made about how to proceed and what work should be finished was not at all unreasonable. In this regard it should be noted that the decision to lay off the employees was not made upon the respondent becoming aware of the application for certification, but only later when the call came from Consoltex. Although the decision is admittedly not an easy one to make, given the timing involved, in all of the circumstances we are satisfied, on the balance of probabilities, that the respondent's decision to lay off all of the employees was not motivated by anti-union considerations.

18. Not all of the employees recalled by the respondent were recalled at the same time, and some appear to have been recalled for only short periods of time. The grievors were not recalled at all. However, there is no basis on the evidence before us to indicate that four of the grievors, namely, Rojek, Oriet, Pukay and Sood, might have been singled out for their support of the union. None of the four had actively been involved in the organizing campaign, and other union supporters were recalled. Further, the respondent led evidence as to the restricted type of work Rojek, Pukay and Sood had performed, and as to Miss Oriet's slowness and fact that there was no call for the work she normally performed. We are satisfied that the decision not to recall these four was not motivated by anti-union considerations.

19. The situation with respect to Mrs. Hollinsky is rather less clear cut in that she was known by the respondent to be an active union supporter. However, the respondent did establish that it did not require all its staff, and that Mrs. Hollinsky was among its slowest and less accurate employees. In these circumstances, it would have not been unreasonable for the respondent not to have recalled her. It is of some note also that the respondent for varying periods of time did recall Mrs. Hollinsky's sister. It would have been reasonable for the respondent to assume that Mrs. Hollinsky's sister was a union supporter, as in fact she was. Accordingly, her recall would not have been consistent with an attempt to ensure union supporters were not recalled. In these circumstances, we are satisfied on the balance of probabilities that the respondent's action is not recalling Mrs. Hollinsky was also not motivated by anti-union considerations.

20. Having regard to the above conclusions, the complaint is hereby dismissed.

1723-81-R Service Employees Union, Local 478, Applicant, v. Waldheim Nursing Home Ltd., Respondent.

Employee – Whether registered and graduate nurses employed by nursing have exercising management functions – Whether supervisory functions stemming from management or professional status

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members W. H. Wightman and H. Simon.

APPEARANCES: *Ron Davidson and Joe Aggimenti for the applicant; S. C. Bernardo and Mike Walter for the respondent.*

DECISION OF THE BOARD; January 21, 1982

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. The applicant has applied to be certified as bargaining agent for the registered and graduate nurses employed by the respondent at its Huntsville Nursing Home. The respondent contends that all of the registered and graduate nurses employed at its Huntsville facility perform “managerial functions” within the meaning of section 1(3)(b) of the Act.
4. The respondent operates a nursing home for the mentally retarded at Huntsville which employs 31 persons in a full time bargaining unit of support staff and an approximately equal number of part-timers who are excluded from the support staff bargaining unit. The home operates on a three shift per day, seven day per week basis. An administrator, with overall responsibility for the running of the home, works the day shift, Monday to Friday, as does the Director of Nursing. About half of the support staff are assigned to the day shift with the remainder working afternoon or midnights. The home employs four full-time registered nurses. It is these four which the applicant seeks to represent. There is a registered nurse assigned to each of the three shifts per day. There is no one employed as a kitchen, maintenance or cleaning supervisor. The registered nurse is the senior person on duty during the afternoon and midnight shifts and is responsible for the direct supervision of the nurses’ aides, and R.N.A.’s and the kitchen, cleaning and laundry staff who are working during these shifts.
5. There is no job description setting out the normal duties and responsibilities of the registered nurses employed by the home. The evidence before the Board, as agreed between the parties, is that the registered nurse has the authority to verbally reprimand other members of the staff. Where a member of the staff is engaging in culpable activity it is the responsibility of the registered nurse to correct the immediate situation and, if necessary, to send the employee home. Where a member of staff is engaging in culpable behaviour, however, the registered nurse is required to report the incident to the Director of Nursing for follow-up. Support staff work assignments are routine in nature so that once the initial training has been given an employee is expected to know what is required of him and needs very little in the way of day-to-day direction. The registered nurse is involved in the initial training of the R.N.A.’s and

aides. The registered nurse is not required to complete written assessment reviews with respect to the performance of support staff employees. However, a verbal report is made to the Director of Nursing. The Director of Nursing is responsible for the scheduling of all employees but the registered nurse in charge of a shift can grant casual time off. Where a shift is short staffed by reason of illness or other unexpected absence, the registered nurse in charge is responsible for reassigning work and calling in a part-timer to cover. Except in the absence of the Director of Nursing the registered nurse does not become involved in the hiring of staff. There is no evidence that the registered nurse acts as a member of management in the processing of grievances under the support staff collective agreement.

6. The patients of the home require regular medication. The registered nurses, in addition to their general supervisory duties described above, are responsible for administering the medication to the patients, for reviewing the nursing care plans, filing of medical records and responding to medical emergencies such as seizures. The Director of Nursing, who works the day shift, leaves instructions for the upcoming shifts and receives a report from each shift. She is available by phone in the event of a significant emergency.

7. Section 1(3)(b) of the Act provides:

“1(3) Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee,

(a) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.”

8. The Act does not contain a definition of “managerial functions” so that it is left to the Board, working from first principles, to make the determination on a case by case basis. The Act is designed to provide for and support collective bargaining as the preferred means of determining terms and conditions of employment. The scheme of collective bargaining established under the Act, however, recognizes the competing interests of the employer on the one side and the employees on the other. The Board therefore, in applying section 1(3)(b) of the Act, must make determinations with respect to what constitutes “managerial function” in such a way as to allow for the broadest possible application of the Act without creating the potential for a conflict of interest which would be destructive of the collective bargaining process. In order to make the proper determinations in this regard the Board pays particular attention to both the nature of the employer’s organization and the type of work being performed by the persons whose status as employees under the Act is in dispute.

9. The Board has had extensive experience in dealing with the status of registered nurses as employees under the *Labour Relations Act*. In a series of hospital cases the Board has been called upon to decide the employee status of head nurses. (See *Peterborough Civic Hospital* [1973] OLRB Rep. Mar. 154; *Ajax and Pickering Hospital* [1970] OLRB Rep. Feb. 1283; *Essex Health Association* [1970] OLRB Rep. Nov. 824; *Toronto East General & Orthopaedic Hospital Inc.* [1974] OLRB Rep. Oct. 671; *St. Peter’s Hospital*, [1976] OLRB Rep. Mar. 247; *Westmount Hospital* [1976] OLRB Rep. Feb. 24; *Cottage Hospital (Uxbridge)*, [1980] OLRB Rep. Mar. 304.) In all these cases the Board has recognized the professional competence of the registered nurse and, within the context of the hospital work setting, has refused to automatically equate the supervisory, co-ordinating and reporting role

of the nurse, as a professional member of the health care team, with “managerial functions” within the meaning of section 1(3)(b) of the Act.

The following passage found in re *Essex Health Association*, *supra*, is especially instructive.

Professional or semi-professional employees such as head nurses and nurses have a different relationship with management in matters falling within their professional competence and the performance of their professional duties than employees engaged in production in other industries. While the criteria applied to determine whether professional or semi-professional persons exercise managerial functions are basically the same as with persons concerned with production, in applying such criteria a distinction must be made between functions which are of a managerial nature and functions which are inherent in the exercise of such persons’ professional or technical skills. While nurses may give certain directions to others, e.g. orderlies, in the exercise of their professional skills, these directions are not dissimilar to the directions given by a journeyman to an apprentice in other crafts. Again, the reporting functions exercised by head nurses in this case may be likened to the reports one may expect from a journeyman concerning the progress of the apprentice. The head nurses report but they do not initiate independent action with respect to the employment status of others who must follow the assignments given by the head nurse. It is also interesting to note that the assistant head nurses, whom the parties have agreed are included in the bargaining unit, perform substantially the same functions as the head nurse on the shifts not worked by the head nurse.

10. The same considerations which govern in the hospital cases have been applied in a series of nursing home cases dealing with the employee status of registered nurses. The employer has argued in these cases that all of his registered nurses exercise “managerial functions” within the meaning of section 1(3)(b). (See *Regional Municipality of Halton*, [1980] OLRB Rep. Nov. 1684, *Belvedere Heights Home for the Aged*, [1978] OLRB Rep. Oct. 890, *Peel Manor Home for the Aged* [1979] OLRB Rep. Jan. 52, *Villacentres Limited* [1973] OLRB Rep. Dec. 646, *Corporation of the City of Hamilton* [1972] OLRB Rep. July 697, *Oakwood Park Lodge* [1977] Board File No. 0643-77-R. In deciding these cases the Board has not distinguished the nursing home setting, from the hospital setting and, as in the hospital setting, has recognized the professional training and competence of the registered nurse working in a nursing capacity. The Board, as in the hospital cases, has refused to automatically equate the supervisory, co-ordinating and reporting role of the registered nurse with “managerial function” within the meaning of section 1(3)(b) of the Act.

11. On the evidence before us in this matter it is clear that the registered nurses for whom the union seeks bargaining rights exercise the supervisory, co-ordinating and reporting functions which are required of most registered nurses in their professional capacity. Can it be said, however, that their duties and responsibilities go beyond the professional responsibilities expected of a registered nurse and encompass “managerial functions” which, if permitted to reside in a person bargaining collectively under the Act, would create the potential for the type of conflict of interest referred to earlier? The answer is no. We are satisfied on the evidence before us that “managerial function” with respect to the discipline, assessment, scheduling and

hiring of staff rests with the Director of Nursing and not with the registered nurses. It is the Director of Nursing who acts upon the report of the registered nurse in discipline matters. Similarly, it is the Director of Nursing who acts upon the report of the registered nurse with respect to the assessment of staff members. It is the Director of Nursing who schedules the staff of the nursing home. It is the Director of Nursing, presumably in conjunction with the Administrator, who hires staff. The Director of Nursing is present on the day shift and can be reached at other hours in the event of significant emergencies. Having regard to the foregoing, it is our view that managerial authority resides in the Director of Nursing and we hereby find the registered nurses who are the subject of this application to be employees within the meaning of the Act.

12. Having regard to the agreement of the parties the Board further finds that all registered and graduate nurses employed by the respondent at Huntsville, Ontario, save and except the Director of Nursing, the Director of Nursing in Training and those above the rank of Director of Nursing, persons regularly employed for not more than 24 hours per week, and persons covered under subsisting collective agreements, constitute a unit of employees of the respondent appropriate for collective bargaining.

13. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on November 18, 1981, the terminal date fixed for this application and the date which the Board determines under section 103(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

14. A certification will issue to the applicant.

1224-81-M Helen Sarah Freedhoff, Applicant, v. The York University Faculty Association, Respondent Trade Union, v. **The Board of Governors of York University**, Respondent Employer.

Religious Exemption – Application based on religious and non-religious grounds -- whether general overall thrust of objection religious -Burden on applicant -Board not exercising discretion to grant exemption

BEFORE: G. Gail Brent, Vice-Chairman, and Board Members F. W. Murray and H. Kobryn.

APPEARANCES: *Gerald Vandezande for the applicant; Sandy Price for the respondent trade union; no one for the respondent employer.*

DECISION OF G. GAIL BRENT, VICE-CHAIRMAN, AND BOARD MEMBER H. KOBRYN; January 20, 1982

1. The applicant has applied to the Board for an order under section 47 of the *Labour Relations Act* that she be exempt from paying any dues, fees or assessments to the respondent trade union because of her religious conviction or belief.

2. The applicant is a professor of Physics and has been employed by the respondent employer (hereinafter referred to as "York") since September 1967. There is no doubt that she is a person of strong religious conviction or belief. She is an orthodox Jew who was raised in an orthodox Jewish home and who has continued the orthodox tradition in her own home. She has belonged to orthodox synagogues all of her life and attended parochial school, as do her children. In addition, she also taught in parochial schools while she was a student. She and her husband contribute approximately 10% of their annual combined incomes to charitable organizations.

3. The preceding paragraph cannot, in any sense, do justice to the applicant's religious beliefs. It is intended only as a very brief summary of her religious background. Suffice it to say that the Board accepts that the applicant is a person of very real and sincerely-held religious beliefs, and is someone who has attempted to lead her life in conformity with the laws and tenets of Judaism. The applicant testified that she believes that the Torah was divinely inspired and that God has directed people to govern their association with others by the precept: "Do not do unto others what you would not have done unto yourself". She conceded that there is nothing in her religion which expressly prohibits membership in or participation in a trade union; however, she testified that her religion has taught her to guide her life according to principles of justice, mercy, charity and respect, and that she cannot accept that it is just to allow innocent people (the students) to suffer as a result of a dispute which the trade union may be having with York. She said that she could never participate in, condone, or support such an action, and that the payment of any dues or other assessments to the trade union would involve her in supporting such an injustice, thereby violating her principles.

4. The applicant referred to three specific examples of the trade union's actions which she believed would involve harm to innocent third parties and would be a violation of her principles. Two examples involved what she interpreted as support for two other unions who were on strike against York, and one involved the withholding of grades during a period

when the trade union was involved in negotiations with York. The applicant testified that she continued to teach during the two strikes referred to above, and that she did not withhold students' grades.

5. The applicant was a member of the faculty association which, for the sake of simplicity, can be regarded as the organization from which the trade union emerged. Needless to say, that organization did not engage in strikes. The applicant said that she had no religious objections to belonging to such an organization. She resigned in November 1975 after it became evident to her that the trade union would be certified and that her dues would be used to support the certification drive. Her letter of resignation is reproduced below:

November 13, 1975

Executive Committee
York University Faculty Association
3619 Ross Building

Dear Sirs,

I have regretfully decided to withdraw from the Faculty Association. Could you remove me please from yours lists, and instruct Payroll accordingly?

Thank you very much.

Yours very truly,

Helen Freedhoff
Associate Professor

6. The applicant was involved in the activities of a group which called itself Independent Faculty Members of York University (hereinafter referred to as "IFM") and which appears to have been organized to oppose the certification of the trade union. She was one of what may be regarded as an "inner group" of approximately thirty faculty members who gave more money and time to the cause. The applicant estimated that she contributed about \$1641.00 to the group. She was also one of the six applicants for judicial review following the certification of the trade union. She testified that she became involved in these activities because she felt that unionization was wrong in every way for the University, and because she knew that personally she would be in severe difficulties because of her beliefs. The group issued a series of newsletters which outlined its activities and reasons for opposing the trade union. In Newsletter No. 16 the following passage occurs:

Opting-Out. As reported in recent "York Bulletins", the parties have agreed to extend to February 4, 1977 the provision of the collective agreement that allows non-YUFA members to pay an equivalent of union dues to one of several specified student aid funds. Over 90 individuals availed themselves to that clause prior to the initial deadline on January 15. We recommend that other non-YUFA members take advantage of this extension in the deadline. This will be your last chance

for the remainder of this collective agreement and, probably, for the remainder of your time at York.

The applicant's name appears at the bottom of this newsletter, and all other newsletters submitted, as a person who could be contacted with comments regarding the contents.

7. The first collective agreement entered into between the trade union and York contained the following provisions governing the deduction of dues from those who were not members of the trade union:

4.02 The Employer shall make the same deductions from the salaries of employees who, as of the date of signing of this Agreement, are not members of the Association, provided that any such employee, by 15 January 1977, may file with the Employer a declaration stating that he/she does not, on grounds of affirmatively expressed religious belief or personal conviction, desire such monies to be remitted to the Association, in which case an equivalent amount shall be remitted to a bursary/scholarship fund as specified in Appendix B.

• • •

4.04 The declaration shall express clearly the grounds of the belief or conviction, and a copy thereof, if accepted by the Employer, shall be forwarded to the Association by the Employer.

The above provisions appeared in each collective agreement until the current one which came into effect on May 1, 1981. The current collective agreement does not contain any provision for the filing of a declaration to have the amounts remitted to a scholarship fund.

8. The applicant never became a member of the trade union and filed a declaration under Article 4.02. Her letter was filed on January 6, 1977 and is reproduced below:

Mr. W. D. Farr
Office of the Vice-President
Employee and Student Relations
S906 Ross Building
York University

Dear Mr. Farr,

I, Helen S. Freedhoff, of the Faculty of Science, York University, hereby notify the University that I do not wish any salary deduction to be made from monies that are owed to me or may in the future be owed to me by the University for the purpose of fees, assessments or dues specified by the York University Faculty Association.

I make this notification pursuant to the provisions of a purported Collective Agreement between York University and the York University Faculty Association without prejudice to my right to object to the

validity of such Agreement at any time. I further request that if any monies are deducted from monies owed to me in lieu of Association dues, fees or assessments pursuant to the provisions of the purported Collective Agreement, such monies be paid into the Ruth Hill Memorial Scholarship Fund referred to in the purported Collective Agreement.

It is my strong personal conviction that unionization and the adversary relationship it implies are totally inappropriate to the structure of the University, and could result in the destruction of the University as we know it. Unionization in fact reflects a social system this country as a whole can no longer afford, and should have outgrown at this stage of its social and economic development. In more socially advanced countries there is movement today towards better labour-management co-operation and collegiality even in the factories and mines. It is therefore a particularly retrograde step for an institution of a type which has enjoyed for centuries a collegial form of government to be taking at this time.

I simply cannot in any conscience support an organization I believe to be so potentially damaging to this institution, to the principle of academic freedom, and to the pursuit of excellence. To do so would be both morally and professionally debasing.

Yours, sincerely,

Helen Freedhoff
Associate Professor

The applicant testified that the first two paragraphs were drafted by the lawyer retained by IFM and that she drafted the rest of the letter. It appears that she saw at least one other letter written by one of her colleagues in IFM, because she admitted to having copied the language which she used in her last paragraph from Dr. MacEachran's letter.

9. It was the applicant's evidence that her "strong personal conviction" referred to in the letter was that unionization could damage both the University as an entity and the students. It is clear that she regarded the University before unionization as a collegial institution where the effective power was exercised by the faculty members, and that she views unionization as a retrograde step which is inconsistent with the collegial atmosphere which she preferred and enjoyed. She also considers that the status of university professors is lower in a unionized university than in a non-unionized one, both in real terms and in the eyes of the public.

10. The applicant stated that the letter she wrote in 1977 contained assertions which were based on her beliefs concerning justice, the Golden Rule, and the way in which one should behave towards others. She said that she believed then that the religious exemption referred to in the *Labour Relations Act* required membership in a sect which had a positive prohibition against joining a trade union and that she would not qualify for an exemption on that ground.

11. In 1978 the applicant was one of a group who became apprehensive about the loss of the right to direct that the money deducted from their cheques be remitted to charity. She signed two letters, both dated May 1, 1978, which were directed to the Chairman of the Board of Governors of York. The first letter merely requested the opportunity to appear before the Board of Governors at their next meeting; the second accompanies a petition which the applicant also signed. The letter and the petition is reproduced below:

Mr. Bertrand Gerstein,
Chairman,
Board of Governors,
York University,
4700 Keele Street,
Downsview, Ontario.

Dear Mr. Chairman:

With this letter we submit for consideration and action by the Board of Governors a petition circulated among approximately one third of the full-time faculty members and librarians of York University. Approximately 80% of the faculty members, to whose attention we had time to bring the petition, signed. You will note that a total of 277 signatures are on the petition.

The petition is, we believe, self-explanatory. Since we assume that members of the Board of Governors are committed, individually and collectively as members of the Board and as citizens, to the continuance of academic freedom in York University there is no need for us to repeat here why academic freedom is essential in the life of York University. There may be need, however, to stress the need to respect the conscience of individual members of the faculty and librarians of York University. If academic freedom is to prevail in York University it is essential that the conscience of individual faculty members be respected without exception.

The purpose of this petition, therefore, is to request that the Board of Governors of York University act to ensure that;

1. No present or future full-time faculty member or librarian be required to join or to pay dues to the York University Faculty Association.
2. No person returning or moving to a position as a full-time faculty member or librarian be required to join or to pay dues to the York University Faculty Association.

It had been our hope to be in personal contact with each librarian and full-time member of the faculty of York University. It soon became

apparent, however, that a substantial percentage of our colleagues were not in their offices at times when we tried to find them.

Had we been able to contact all of the full-time members of the faculty and librarians of York University, we believe that a very substantial majority of them would have signed this petition. From the contacts we have made with members of the faculty who are members of the York University Faculty Association we know that many of our colleagues recognize that if academic freedom is to be preserved the conscience of individual faculty members and their freedom to associate or not to associate must be respected. That a substantial number of the members of York University Faculty Association are among those who have signed our petition is evidence of this.

So that individual members of the Board of Governors may be aware that we have submitted this petition we are taking the liberty of sending to each of them a copy of this letter. Because Vice-President Farr as part of his responsibilities is involved in the matters to which we referred we are also sending a copy of this letter to him.

Signed”

“Signed”

“Signed”

“Signed”

“Signed”

cc. Members of the Board of Governors,
H. I. Macdonald,
W. D. Farr

PETITION

We, the undersigned faculty members and librarians, believe that no person should be compelled to join or contribute funds to the Faculty Union against his or her principles. This freedom of choice is preserved in the existing collective agreement. We, therefore, petition the Board of Governors of York University to continue in any future collective agreements the rights of present and future faculty members and librarians specified in Sections 4.02-4.05 of the existing collective agreement.

Specifically, Sections 4.02-4.05 allow employees who are (1) not now members of the York University Faculty Association, (2) newly appointed, or (3) returning to the bargaining unit from excluded positions, to refrain from paying Association fees, dues or assessments and, instead, requires them to pay an equivalent amount to one of several specified

bursary/scholarship funds. To qualify for this, each employee must file a declaration with the Employer "stating that he/she does not, on grounds of affirmatively expressed religious belief or personal conviction, desire such monies to be remitted to the Association..."

Name

Department

Signature

The original of this petition has been given to the Chairman of the Board of Governors of York University and contains 277 signatures of librarians and faculty members of York University.

12. She testified that the concerns expressed in the letter and in the petition are the same as those expressed in her testimony. She said that her conscience is the voice of God directing her choices and that her very strong feelings of what is right and what is wrong flows from this. She concedes that conscience may exist apart from religious beliefs, but asserts that in her case they are inseparable.

13. On April 29, 1981, the applicant wrote the following letter in anticipation of the change in the collective agreement:

Mr. W. D. Farr
Vice-President
Employee and Student Relations
S906 Ross

Dear Mr. Farr,

Please be advised that I cannot in good conscience join and/or pay dues to the York University Faculty Association because of my religious convictions.

Yours sincerely,

Helen Freedhoff
Professor of Physics

She said that she wrote this letter herself prior to consultation with her counsel and that it expressed her views as they have always existed. She testified that prior to April, 1981 she became aware for the first time that her personal religious beliefs were relevant in seeking an exemption under the Act, and that she would not be barred from seeking an exemption because of the lack of an express prohibition against trade unions in Judaism. She said that she learned this from a member of her synagogue who also happens to be a member of the provincial legislature. She also testified that she even consulted her Rabbi to ensure that there was nothing which she had overlooked and was assured by him that there was no express prohibition against unions or strikes.

14. It appears that a group of people who were largely IFM supporters applied for religious exemptions from the payment of dues at around the same time that the applicant did. The applicant was aware that these other applications had been made or were being made, although she said that there were no discussions concerning the applications. She testified that she first contacted Mr. Vandezande in May 1981, and that after that she wrote a memorandum which she sent to some people whom she thought might be interested, in order to have them attend a meeting to discuss how to proceed if they wished to obtain a religious exemption from paying dues. She said that she did not know at the time whether any of the people to whom she sent the memorandum had any strong religious beliefs; however, all of those to whom she sent the memorandum were people whom she knew from the IFM, so presumably she knew what their feelings were toward the trade union.

15. In August the applicant drafted her application to the Board. In it, at paragraph 5, she gives the following as grounds upon which she seeks her exemption:

I object to paying dues to the York University Faculty Association because I adhere to the tenets of Judaism, and perceive the Union to be antithetical to its ethics. Judaism is devoted to scholarship and excellence; the Union's practices can lead only to mediocrity. Judaism fosters law and order; the Union practices disruption of society. Judaism is concerned with the welfare of the whole community; the Union promotes selfish individual interests.

16. When questioned about what she meant by the words used in the application, the applicant's evidence was that her statement about excellence and mediocrity was more a comparison between the way of life encouraged by Judaism and what she perceives to be the result of the pursuit of policies which she believes the trade union espouses. She considers that the elimination of merit pay in salaries and the proportionately smaller increases given to those at the top of the salary scales will ultimately lead to a situation in which the best people will be paid less than their market value and will leave York. She also said that she perceives that the trade union's ability to achieve a high salary settlement has caused York to sacrifice services in other areas and has selfishly harmed the university community as a whole. She did not explain how the university could both materially reward excellence and not sacrifice something.

17. The applicant testified that she could not remain in her present position if she had to support the trade union in any way.

18. In *Wybenga*, [1976] OLRB Rep. Aug. 422, the Board identified three questions which must be asked about the nature of the applicant's beliefs in a case such as this. Those questions are:

1. Are the beliefs sincerely held?
2. Are the beliefs religious?
3. Are the beliefs the cause of the objection of paying dues to the trade union?

Those questions are the ones which this Board must answer in determining this case.

19. It has long been held by this Board that an applicant need not be a member of a religious sect which espouses as part of its dogma or doctrine opposition to trade unions. The proposition has been so well established that it almost seems trite to refer to authority to that effect. The Board is concerned not with religious orthodoxy, but rather with the personal religious beliefs of the applicant. That was first set out in *Stel*, [1971] OLRB Rep. July 363, and has been followed consistently since then. Accordingly, the fact that Judaism espouses no prohibition against unions or strikes is not fatal to the applicant's case.

20. There can be no doubt that the applicant is a very religious person who comes from a religious background. There is also no doubt that she is a person who has strong religious beliefs. Had the evidence before this Board been only that strikes which harmed innocent third parties were, in her opinion, contrary to the tenets of Judaism concerning God's directions about how one ought to conduct oneself in society, then the case would have been much more clearly a case in which all three of the *Wybenga* questions could have been answered in the affirmative. The evidence before this Board went much beyond that, and in order to determine whether the *Wybenga* questions can still be answered in the affirmative in light of all of the evidence, the Board must look very carefully at the situation before it. As pointed out in *P.C.L. Packaging Ltd.*, [1980] OLRB Rep. Oct. 1514, where there has been a history of union opposition, the skepticism of the trade union to an application of this sort is understandable, and the Board must view the matter with great care. Indeed, it would do nobody interested in the integrity of the legislation and of the procedure any good if the section could be used by those whose objection to paying dues to a trade union was based on considerations which could not be considered to be religious in any sense. The legislation was not intended to allow all of those who object strongly to trade unions to avoid their contractual obligations.

21. In this case, the applicant has a history of opposition to the trade union, and a history of active opposition to it. It is not surprising that the activities undertaken by the applicant, as part of IFM, around the time of the trade union's certification do not expressly advert to her religious beliefs as the basis for this objection. In the context of the debate which was going on, those views would have been irrelevant. The IFM and the applicant, as one of its more active members, were concerned with the pros and cons of unionization within a university community. The argument naturally revolved around the consequences which each side in the debate believed would flow from the facts of certification and collective bargaining. The debate is not unique to York, and the arguments espoused by the protagonists had to be resolved by individual faculty members according to their own assessments of the arguments and of the consequences. Statements concerning personal motivation arising from religious beliefs would not have been appropriate in such a context, and the silence of the literature put out by the IFM about any religious basis for the opposition among its members is a neutral fact in determining whether the applicant's objection to the payment of dues is caused by her religious beliefs.

22. Section 47(1) of the Act reads as follows:

Where the Board is satisfied that an employee because of his religious conviction of belief,

- (a) objects to joining a trade union; or
- (b) objects to the paying of dues or other assessments to a trade union,

the Board may order that the provisions of a collective agreement of the type mentioned in clause 46(1)(a) do not apply to such employee and that the employee is not required to join the trade union, to be or continue to be a member of the trade union, or to pay any dues, fees or assessments to the trade union, provided that amounts equal to any initiation fees, dues or other assessments are paid by the employee to or are remitted by the employer to a charitable organization mutually agreed upon by the employee and the trade union, but if the employee and the trade union fail to so agree, then to such charitable organization registered as a charitable organization in Canada under Part I of the *Income Tax Act* (Canada) as may be designated by the Board.

As pointed out recently in *York University and Douglas N. Butler*, [1981] OLRB Rep. Sept. 1319 the Board cannot ignore the word “religious” in that section and must attempt to give some content to that word. The Board does not accept that all beliefs and convictions held by a religious person are necessarily religious beliefs and convictions. A religious person may believe that the world is flat but that belief, like any other belief which does not obviously relate to God and things divine, must be examined to determine whether it is in fact religious insofar as that particular believer is concerned. Accordingly, the applicant’s beliefs about the appropriateness of trade unions in the university community, the lowering of the status of professors in a unionized university, the encouragement of mediocrity in a unionized university, etc. cannot be accepted as religious beliefs merely because the person who believes them is religious.

23. In both *Butler* and *Stel* the Board referred to *Adelaide Company of Jehovah’s Witnesses Inc. v. The Commonwealth* (1943), 67 C.L.R. 122 for guidance in determining what meaning should be given to the word “religious”. That case points out that almost anything may become an element in religious belief and that individuals, in fact, give their own content to their religion; however, it was obvious to the Court that when the Legislature used the word “religious”, it must be given some content, and there must be some way of determining what is religious and what is not religious. Accordingly, at pages 123 and 124 the Court said:

It is true that in determining what is religious and what is not religious, the current application of the word “religion” must be taken into account.

That current application was determined in *Butler*, at paragraph 17, to be as follows:

...the beliefs must relate to the Divine (in some form) and man’s perceived relationship to the Divine, rather than to concepts which deal only with man-made institutions, and the relationship of men *inter se*.

That definition seems to be entirely in accord with the definition of religion as applied in the *Stel* case, and in every subsequent case where the issue has been considered.

24. In any situation, a person of strong beliefs can well find difficulty in tracing the source of those beliefs. That is understandable. If one gives any credence to the theory that a person is the product of his or her upbringing and environment, then clearly a religious person raised in a religious environment will tend to attribute the existence of a great many beliefs

about the way the world ought to be to his or her religious convictions or beliefs. That is not to suggest that such a person is in any way trying to mislead anyone, but only that he or she may have lost a sense of objectivity when scrutinizing his or her beliefs. Under the Act, the person must not only be able to convince himself or herself that religious beliefs are the cause of the objection to paying dues, but must also be able to convince the Board of that same thing.

25. In the case at hand, it appears reasonable to accept that the applicant's objection to strikes where innocent third parties are injured is religious in nature because it does relate directly to her religious beliefs concerning the way that God has, in her view, commanded his creatures to act. Her other views concerning the loss in status of professors, the advancement of mediocrity, the inappropriateness of unions in a collegial milieu, the abandonment of merit pay, unionization as a retrograde step, etc., are not religious beliefs or convictions, even though they are held by a religious person whose ideas about right and wrong were formed in a religious environment. These are beliefs which are political in nature, because they relate solely to the atmosphere which, in her view, should prevail in a university; and, even though their source may be what she has learned from the study of her religion, that source is such a remote link in her chain of reasoning that those beliefs or convictions cannot be called religious.

26. In coming to this conclusion there are some facts which have been persuasive. In 1977, when it would have been appropriate to mention religious beliefs when declaring that she did not wish her money to go to the trade union, the applicant chose to ask for an exemption on the basis of personal conviction and to proceed to attack the concept of unionization and the destructive nature of unions in a university. She did not once mention her religious beliefs nor did she specifically refer to the harm which could be caused to the students if there were a strike. Further, in Newsletter No. 16, her name was attached to a document which advocated the general opting-out of the trade union without reference to religion as a reason. In May of 1981, when she contacted Mr. Vandezande, she arranged a meeting and contacted other members of IFM about attending. She did this without knowing whether they had any religious beliefs or any religious objection to having their dues paid to the trade union. All she knew, because of their association with IFM, was that they were opposed to the trade union. She said that she thought that if they were interested they would attend, and that many to whom she sent the memorandum threw it away. It is difficult, given her past activities both in advocating opting-out and in opposing the trade union, to characterize this as anything other than a continuation of her general efforts to oppose supporting the trade union and to show others how they could finally withhold support from the trade union. One would have expected that someone with a religious belief or conviction, which gives rise to an opposition to the payment of dues to the trade union, would have dealt with the matter as a personal one, or would have shared the information with others who also had strong religious beliefs, rather than to have engaged in activities which appear to be linked to the sort of general opposition mounted by IFM. In addition, the application itself, which was drafted by the applicant, appears to express an opposition to the trade union based on what the applicant considered was a way of life valued by Judaism, rather than expressing any opposition based on any divine dictum, such as the one which she related when stating the basis of her objection to strikes which injured innocent third parties.

27. This case is one then which appears to be similar in some respects to *University of Windsor*, [1979] OLRB Rep. May 458, where the applicant had religious beliefs, but it was found that those beliefs were not the cause of his objection to the union. There the Board

determined that the applicant had a general objection to trade unions rather than an objection caused by his religious beliefs. In *Nobels*, [1971] OLRB Rep. July 393, it was argued that there were motivations, other than religious, in the application. It was found there that there were no other motivations because the preference for a Christian union was intrinsically a part of his religious objection. Only one case, that this Board is aware of, ever considered whether a dual motivation would preclude an applicant from succeeding. In *Hogetorp*, [1972] OLRB Rep. Feb. 132, the Board held, in paragraph 11, that the dual motivation, because of its religious connotation, did not deprive the applicant of relief. That was also a case which involved a member of the Christian Reform Church who expressed a preference for a Christian union rather than the U.A.W. The Board clearly found that the preference was one which was rooted in Mr. Hogetorp's religious beliefs. It then went on to observe, *in obiter*, that the religious objection need not be the sole or primary cause for seeking the exemption, but need only be *bona fide*.

28. In this case there is an apparent *bona fide* religious conviction or belief on which the applicant bases her objection; however, there is also a set of convictions or beliefs which are not religious on which the application is also based. As pointed out in *Stel*, section 47 is discretionary — the Board “may order” that the collective agreement provision does not apply. In *Stel* the Board declined to state how this discretion would be exercised, and all subsequent cases have wisely refrained from so doing. This Board will not comment on how the discretion should be exercised either; however, the wording of the section — the need for the Board to be “satisfied” and the presence of the discretion — leads us to conclude that there never was any legislative intention that the exemptions should be granted automatically whenever an applicant could point to an apparent religious belief or conviction on which to base an objection, when the general overall thrust of the objection was not religious in nature. It is our view that, when the overall thrust of the objection is seen not to be religious, the objection cannot be characterized as being “because of [the applicant’s] religious conviction or belief” within the meaning of section 47. The presence and relative importance and weight given to the obviously non-religious reasons must be considered, based on the evidence in each case. In this case, it is our view that the evidence indicates that the non-religious reasons were so important to the applicant that they must be considered as so colouring the application as to be the cause of the objection. The overall importance of those other reasons is such that the real importance of the religious convictions and beliefs in the context of the objection is hard to assess, and so one cannot be satisfied that the objection is because of the religious conviction or belief. It should be noted that the burden is on the applicant to satisfy the Board, on balance, that section 47 relief should be granted, and that the applicant is not entitled to the benefit of any doubt.

29. The applicant is sincerely convinced that unionization is bad for the university and that her objections are religious in nature. The former is something on which we can express no opinion. It is a matter which has been left to be decided by the faculty members of the universities in this province. The latter is something of which the Board is not convinced, although it does not wish to suggest that the applicant was in any sense attempting to mislead or deceive when she gave her evidence. On the contrary, at all times she appeared to be forthright and open with this Board and did not try to obscure her role in the fight against unionization. One can only hope that she will be able to reconcile her objection to the trade union with her beliefs, and be able to continue to teach and to contribute to the academic life at York.

30. For all of the reasons set out above, the application is dismissed.

DECISION OF BOARD MEMBER, F. W. MURRAY;

1. I dissent.
2. I would have found that the Applicant's objection to the trade union movement and to her own participation in the affairs of the Union and contribution to the Union was based in fact on what the Applicant herself concluded from her religious upbringing and training.
3. The Applicant testified that of the four principles her religion had taught her as a guide to her life, namely, justice, mercy, charity and respect, she herself had concluded that of these the most important was justice. Here she referred to an ancient Jewish scholar, Rabbi Hillel, who, in his writings, emphasized the importance of justice and "what is hateful to you do not do unto your neighbour". A number of other references including Micah, a book on the Torah, were also quoted by the Applicant, in which again justice was of primary consideration in developing one's life style and relationship to others.
4. The Applicant also referred to Deuteronomy in the Old Testament, primarily Chapter 16, Verse 20, again quoting that "justice and only justice shall thou follow".
5. The Applicant further went on to testify that she believed the Torah to be the word of God.
6. The Applicant was quite clearly upset with the Faculty Association when she referred to the three examples of the trade union's actions involving harm to innocent third parties, namely the students. She clearly did not agree with the concept of the use of any means towards an end, and felt that regardless of what the Association's objectives were, it should not do harm to the innocent, ie: the students who would suffer as a result of the Association's actions.
7. While it is clear the Applicant was in conflict with the conversion of the Association from an Association to a Trade Union in 1975, it is also clear that she was aware of Section 47 of the *Labour Relations Act* with respect to religious objections, however, she had concluded that in the administration of this section, a pre-requisite was that an objection to the trade union had to be based upon a tenet of church, and she knew this was not a tenet of Judaism. It was early in 1981 that she was advised that this was not a pre-requisite.
8. From the Applicant's deportment and the manner in which she gave her testimony, I would have concluded that the Applicant is not one who wears her religion on her sleeve, but instead believes it to be a private matter, and it is accordingly my belief that it was quite natural for the Applicant, in making her early representations to both the Faculty Association and to the University, not to refer to her religious beliefs. In making these representations, it was only necessary for the Applicant to state her conclusions and not to go on to explain that the conclusions were arrived at because she held certain religious convictions.
9. I believe the question that the Board must address itself to is why did the Applicant believe so strongly in her conclusion that it is wrong to have innocent bystanders suffer in a dispute between her Association and her employer? I am convinced that from the very beginning of her opposition to the trade union, the reasoning behind it stemmed from her religious studies and convictions that on no account, regardless of the cause, should the

students suffer as a result of actions taken by the Association. The fact that she believed that the Union's activities were damaging to the institution in its pursuit of excellence and to the principle of academic freedom was only the result of her religious convictions.

10. In dealing with her answers to the questions asked concerning the grounds upon which she sought her exemption in her application, I was quite satisfied with the answers and did not need to have spelled out to me the fact that the Applicant believed that within a given budget those members of the Faculty who, because of their academic record and ability to teach, would be rewarded and those who failed to achieve a good record in these matters would not be rewarded. This concept does not raise the question of who was "sacrificing something". To me it was clear in her statement that she believed that excellence should be rewarded and the absence of excellence should not be rewarded and this, she believed, was a way of life encouraged by Judaism.

11. I think the Board must distinguish between a conviction or belief and a conclusion arrived at because of certain religious convictions or beliefs. I would find that the Applicant's conclusions that the Union's activities were anti-ethical *to the Applicant's concept* of ethics which she found in the tenets of Judaism were in fact the reason why she filed this application, and why, in fact, she has been an ongoing opponent to the trade union representing the Faculty members and laterly sought exemption from the payment of dues to the Association.

12. Moreover, I would not have found that this is a case involving dual motivation as was found in the *Hogetorp* case, [1972] OLRB Rep. Feb. 132. In my opinion it is clear that the Applicant's conclusions concerning the adverse affect of the Association as a Union on the University community as a whole was solely based on her own religious convictions. The fact that she joined with, or encouraged others who had expressed the same conclusions cannot interfere with the fact that the conclusion she arrived at was based upon and stemmed from her deep-rooted religious convictions.

13. Accordingly, I would have granted the exemption sought by the Applicant.

1079-81-M William A. Jordan, Applicant, v. The York University Faculty Association, Respondent Trade Union, v. The Board of Governors of York University, Respondent Employer

Religious Exemption – Applicant actively leading opposition to unionization of university faculty – No religious grounds raised during such opposition – Whether objections based on religious beliefs or professional concerns

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members W.H. Wightman and B. Armstrong.

APPEARANCES: *Gerald Vandezande for the applicant; G. Charney, S. Price and M.L. Craven for the applicant; no one appeared for the respondent employer.*

DECISION OF KEVIN M. BURKETT, ALTERNATE CHAIRMAN AND BOARD MEMBER B. ARMSTRONG; January 7, 1982

1. This is an application filed by Professor William Jordan of the faculty of Administrative Studies, York University, for an exemption on religious grounds from the mandatory dues check-off provision contained in a subsisting collective agreement between York University and the York University Faculty Association; the respondents in this matter. This one of a number of such applications which have been filed pursuant to the provisions of section 47 of the *Labour Relations Act* by persons covered by this collective agreement.

2. Section 47 of the Act provides:

“47.(1) Where the Board is satisfied that an employee because of his religious conviction or belief,

(a) objects to joining a trade union; or

(b) objects to the paying of dues or other assessments to a trade union,

The Board may order that the provisions of a collective agreement of the type mentioned in clause 46(1)(a) do not apply to such employee and that the employee is not required to join the trade union, to be or continue to be a member of the trade union, or to pay any dues, fees or assessments to the trade union, provided that amounts equal to any initiation fees, dues or other assessments are paid by the employee to or are remitted by the employer to a charitable organization mutually agreed upon by the employee and the trade union, but if the employee and the trade union fail to so agree then to such charitable organization registered as a charitable organization in Canada under Part I of the *Income Tax Act* (Canada) as may be designated by the Board.

(2) Subsection (1) applies to employees in the employ of an employer at the time a collective agreement containing a provision of the kind mentioned in subsection (1) is first entered into with that employer and

only during the life of such collective agreement, and does not apply to employees whose employment commences after the entering into of the collective agreement.”

Section 47 should be read in conjunction with section 46(1)(a) of the Act which provides:

“46.(1) Notwithstanding anything in this Act, but subject to subsection (4), the parties to a collective agreement may include in its provisions,

- (a) for requiring, as a condition of employment, membership in the trade union that is a party to or is bound by the agreement or granting a preference of employment to members of the trade union, or requiring the payment of dues or contributions to the trade union;”

3. The collective agreement which contains the clause from which Professor Jordan seeks his exemption is the third collective agreement between the respondents. In contrast to the current agreement the previous two agreements contained a provision permitting an employee to “opt out” of the payment of union dues by declaring in writing “on grounds of affirmatively expressed religious belief or personal conviction” that he desired such monies not to be remitted to the Association. In cases of exemption under the previous agreements an equivalent amount was remitted to a “bursary scholarship fund.” It was argued in the first of the present series of cases filed by persons covered by the current agreement between the respondents that the earlier collective agreements “required” the deduction of dues in the sense contemplated by section 47(1) and 46(1)(a) of the Act, and accordingly, the application for exemption could only have been brought, pursuant to section 47(2) during the term of the original collective agreement. (See *York University and Douglas N. Butler* [1981] OLRB Rep. Sept. 1319.) The Board, in rejecting this argument, held that:

“a provision in a collective agreement which has the effect of granting an exemption cannot be said to ‘require’ the payment of dues.”

It was also argued in the *Butler* case, *supra*, that the exemption available under the Act lasts only for the duration of one collective agreement and that the applicant in that case had had the benefit of the exemption through the voluntary act of the parties in providing for opting out in the initial collective agreement. The Board rejected this argument as well, and confirmed:

“that no limit has been placed on the length of time during which an exemption granted under the section continues to operate.”

Neither of these arguments was put before the Board in this matter. We have before us an application which satisfies the preconditions necessary to a disposition on the merits.

4. In filing his application in this matter, Professor Jordan set out in writing the grounds upon which he seeks his exemption. His statement reads:

Consistent with the tenets of the Christian religion, I believe in a God who holds each of us individually responsible for our actions,

achievements and failures. Furthermore, I believe that I will be judged by what I actually do, and not by protestations of faith or by conformance to the preferences or practices of various majorities. A tangible expression of my individual responsibility is my professional obligation to create and distribute knowledge (research and teaching) for the benefit of those who chose to avail themselves of my work. This is the means I have been given to compensate others for providing me with my sustenance and, hopefully, to make an extra contribution to society in general. Fundamental to this obligation is the rejection of coercion in any form regarding interruptions in this work that could adversely affect other individuals or could result in my achieving less than what I am capable. The Bible recounts the "Parable of the Talents" (Matthew 25:14-30) in which a master gave each of his servants resources to husband in his absence. When called upon to answer for the stewardship of my life, I do not wish it to be said that I did less than I could in order to further my narrow personal interests. Accordingly, because of my personal religious convictions and beliefs, I cannot in good conscience support the York University Faculty Association and, therefore, I object to paying dues to the association.

5. Professor Jordan testified that at twelve years of age he took it upon himself to begin Sunday School and that at fifteen he was baptized into the Methodist Church. He described himself as a Christian believer who believes in the Bible and follows the "golden rule" of "do unto others as you would have them do unto you" and "love thy neighbour". He described the three important bases of his belief as concern for the individual, love everyone and judgment. Professor Jordan opposed the respondent union from its inception and testified that he did so because the York University Faculty Association stood for things inconsistent with his beliefs. He referred to the compulsion of belonging to the bargaining unit, whereas the essence of the Bible is voluntary action. He referred to the union as an adversarial organization, whereas his belief is that people should work together and co-operate. He referred to the physical and mental violence worked upon individuals by strike action, whereas he respects the rights of others, presumably in accord with the "golden rule". He referred specifically to the potential for harming students who are in a professor's trust, by withholding marks and other such strike tactics. Professor Jordan has not belonged to a church since 1975. However, he has both attended and supported a number of churches since that time. None of the churches to which he has belonged or attended have forbidden membership in a trade union or similar organization. Professor Jordan did not retire from the U.S. Air Force Reserve until 1980.

6. Professor H. Graniststein, the first chairman of the certified faculty association and a driving force behind the unionization of the faculty, testified that Professor Jordan was the key man in opposition to unionization. He testified that Professor Jordan took the professional faculty line which was based on the belief that their interests would not be served by unionization. He never heard religion mentioned by Professor Jordan during the whole course of the organizing campaign. When asked in cross-examination what he meant by religion, Professor Graniststein replied, an organized doctrine of faith and expounded his answer in re-examination to encompass God, Church and all of the things normally associated with religion.

7. Professor Jordan was a member of a group referred to as the "Independent Faculty Members", which actively opposed the certification of the Faculty Association unsuccessfully challenged the certification in the Courts, and attempted to block the ratification of the first collective agreement. Eleven news letters circulated in 1976 by this group were placed in evidence. Professor Jordan, who was an active member, if not the leading force behind this group, is listed as one of the faculty members to contact in order to discuss "these and other aspects of unionization" in each of these newsletters. The first, dated January 15, 1976, sets out a number of points to be considered with respect to unionization. These are:

1. Must all faculty members and librarians be required to join the union? Those who do not wish to join should be allowed to retain their independence rather than being coerced into joining. At the same time it would be reasonable to require such independent faculty members to contribute an amount equivalent to the YUFA dues to a recognized charity.
2. Can individuals be fired for not joining the union? A closed-shop agreement would *require* the University to fire faculty and librarians whose convictions prevent their joining the union. This is a violation of a fundamental academic freedom. Is this hard-won right to be sacrificed for the unknown benefits of unionization?
3. What will be the Senate's power after unionization? The Senate already has the power to help YUFA achieve its substantive goals (read the York University Act, 1965). Would you rather have the Senate or YUFA provide academic leadership?
4. Have the Toronto high school teachers achieved their professional goals by their strike? We can achieve our legitimate objectives through existing mechanisms. Unionization will substitute other, unknown mechanisms which may reduce York's capabilities to produce quality education and research.
5. Will the collective agreement contain a requirement for effective merit pay awards? Salary by seniority is unacceptable in a university seeking excellence.
6. In case of strike, will researchers have access to their offices and laboratories, or will months of work be lost or seriously interrupted?

Although items one and two refer directly to the possibility of mandatory union membership there is no express reference to the dilemma which mandatory dues check-off would pose for a person (as Professor Jordan claims to be) who opposes unionization on religious grounds. Indeed, item two characterizes the issue as a "violation of a fundamental academic freedom".

8. In the newsletter dated May 6, the "key issue before York in Faculty Unionization" is described in the following terms:

The Key Issue before York in Faculty Unionization

The decision of YUFA to ask for a change in the legal relationships with the University unavoidably raised the basic legal question of how these relationships can be changed. This question is related to the fundamental principle of whether or not the legally required *adversarial process of unionization* should take the place of *academic due process*. Members of the IFM believe that academic due process should not give way to the adversarial process. We are convinced that the ability of York to maintain its academic integrity, to function effectively as a centre for the advancement of knowledge and culture through teaching and research, will be greatly decreased if the government of York is based upon a competition for power by two groups, each of whom believes that its interests are inconsistent with the interests of the other.

This statement of the issue, as with the newsletters generally, stresses the impact of unionization upon academic life but says nothing about the dilemma posed for those who may oppose the union on religious grounds.

9. Professor Jordan and a colleague travelled to Lakehead University in 1976 to speak against the unionization of university faculty members. The main thrust of Professor Jordan's arguments, which were consistent with the content of the newsletters, centered on the co-operative nature of faculty versus the adversarial nature of union, and the effect of unionization upon standards. Professor Jordan was quoted in the December 6, 1976 edition of the university newspaper as being opposed to a faculty union because:

"I hope to achieve a better university. In the United States only the third rate universities are unionized. Unionization is an impediment to hiring people who are first rate because they are productive."

Without unionization, he said, "York would have more flexibility to judge professors on output, not input."

Though lack of unionization does not necessarily make for a great, or productive, university, he said, it is "a necessary condition not to be unionized" in order to be one.

When asked in cross-examination if he protested the remarks attributed to him in the university newspaper, Professor Jordan replied in the negative. He replied in the affirmative when asked in cross-examination if he was concerned that the quality of teaching might deteriorate if the faculty became unionized. He also answered in the affirmative when asked if he was concerned that collegiality would deteriorate.

10. Professor Jordan's personal motto is "to achieve". He testified that a strike does not accomplish what he wants to achieve and maintains that he has enough reputation to speak for himself as he has in the past so that he doesn't need a strike.

11. As we have noted, the previous two collective agreements provided for an opting out of the paying of union dues "on grounds of affirmatively expressed religious belief or

personal conviction." By notice to the university dated January 12, 1977, Professor Jordan exercised this right to opt out of the paying of union dues. His notice reads:

I, William A. Jordan, of the Faculty of Administrative Studies, York University, hereby notify the University that I do not wish any salary deduction to be made from monies that are owed to me or may in the future be owed to me by the University for the purpose of fees, assessments or dues specified by the York University Faculty Association.

I make this notification pursuant to the provisions of a purported Collective Agreement between York University and the York University Faculty Association without prejudice to my right to object to the validity of such Agreement at any time. I further request that if any monies are deducted from monies owed to me in lieu of Association dues, fees or assessments pursuant to the provisions of the purported Collective Agreement, such monies be paid into the George A. Edwards Memorial Bursary referred to in the purported Collective Agreement.

This notice is based on my deep personal conviction that unionization is detrimental to the independent scholarship and teaching which are fundamental to furthering the essential activities of a university. The following are just two specific reasons for this conviction: First, I am convinced that compulsory membership in a bargaining unit, with the consequent elimination of significant rights of the individual faculty member (including the right to speak and act for oneself in important matters), is the antithesis of the spirit of a true university. Second, I believe that an adversarial employer/employee relationship is inconsistent with, and destructive of, the collegial governance of the University which is a necessary condition for a university to facilitate and encourage the search for and dissemination of knowledge.

The first two paragraphs of the notice were drafted by a lawyer while the last paragraph was written by Professor Jordan. In relying upon personal conviction rather than religious belief, Professor Jordan explained that the churches he had belonged to have never held that a member cannot belong to a union (he acknowledged in cross-examination that he knew of no other churches which so require) so that he thought religious belief referred to the formal tenets of one's religion. Notwithstanding his reliance on personal conviction rather than affirmatively held religious belief, he maintained that his religious beliefs, as described, were at the root of his objection to paying union dues. He was asked by his counsel if there was any difference between his religious beliefs and personal convictions. He replied "I am a whole person, a complex of all my experiences. My religious convictions are intermingled. They are the same thing and cannot be compartmentalized so conveniently."

12. Finally, following the signing of the current collective agreement Professor Jordan forwarded the following letter to Mr. W.W.D. Farr:

"This is to advise you and the University that I cannot in good conscience either be a member of, or pay dues to, the York University Faculty

Association because of deeply-held convictions. Therefore, as originally requested in my notice to York University dated January 12, 1977, please continue to refrain from deducting from my salary any fees, assessments or dues specified by the York University Faculty Association.

A copy of my original notice is enclosed for your information.

13. In the *Butler* case, *supra* the Board extensively reviewed the jurisprudence and attempted to give meaning to the term “religious” as used in the section. The Board reasoned at para. 16 of that decision as follows:

Compromising between freedom of religion and egalitarian support for a trade union obligated by law to represent all employees in a bargaining unit is a delicate social issue (cf. again *Vis, supra*), and falls properly within the purview of the Legislature. Had the Legislature chosen to grant the objection simply on the basis of “personal conviction”, or “genuine belief”, or “matter of conscience”, it could easily have done so. But it did not. The section is not written simply for “conscientious objectors”. As the Ontario Court of Appeal observed in *Donald v. Hamilton Board of Education* (1945) 3 D.L.R. 424, in considering the meaning of “religion” under the *Public Schools Act*, at page 429:

The fact that the appellants conscientiously believe the views which they assert is not here in question.

The Legislature having chosen to limit the exemption to matters of “religious” conviction or belief, it is the task of the Board to ascribe some weight to that word, and to attempt to distinguish the “religious” from the “non-religious”. This becomes particularly cogent if the recently-enacted section 36(a), 1980, c. 34, s. 2(1), requiring the inclusion in a collective agreement, at the request of a trade union, or a provision effectively requiring all members of a bargaining unit to share equally the costs of their agent, is to maintain its integrity. It is the view of the Board that a conviction or belief, to be “religious” within the meaning of the section, must in some way relate to the more orthodox view of “religion” prevalent in the community. This is, the beliefs must related to the Divine (in some form) and man’s perceived relationship to the Divine, rather than to concepts which deal only with man-made institutions, and the relationship of men inter se.

14. It is against this backdrop that the Board must put its mind to the beliefs articulated and relied upon by Professor Jordan and determine:

- (a) if they are sincerely held;
- (b) if they are religious; and
- (c) if they are the cause of the objection to paying union dues.

(See *Helena Wybenga* [1976] OLRB Rep. Aug. 422.)

15. Professor Jordan maintains that his religious beliefs and personal convictions are inseparable and govern all of his actions. He references his striving for excellence, his abhorrence to compulsion and his distaste for the adversarial to the teachings of the Bible. While he acknowledges that others who also live by the Bible may not feel compelled to object to the payment of union dues, it is on the basis of these beliefs, as referenced to the Bible, that he registers his objection to paying union dues. If the Board had to decide in this matter if the beliefs articulated by Professor Jordan at the hearing are religious within the meaning of section 47, the determination would be a most difficult one. However, even if we accept, without finding, that the beliefs upon which he now relies are religious within the meaning of the section, we would nevertheless be required to find that they are not the cause of his objection to paying union dues. Where an individual has been actively opposed to the trade union and has verbalized his opposition over a long period of time, inferences as to the true nature of his opposition to paying union dues are to be drawn from what he has said in the past. In the absence of some type of intervening religious conversion, which did not occur in this case, there is a heavy onus on an individual who attempts to recast his opposition as religious when religious grounds are the only grounds remaining upon which to oppose the union.

16. Professor Jordan has been opposed to the union from its inception. The evidence which details his opposition satisfies the Board that up to the filing of this application the basis of his opposition was not religious in nature but professional. With the advent of unionism, Professor Jordan envisaged a University with lower standards, less collegiality, fewer "top-notch" professors, a less responsive senate and the possibility of scholastic interference. He felt himself able to do his own bidding and rather than submit to a regime which he thought would destroy his concept of the university he became a vociferous opponent of unionization. Nowhere in the newsletters circulated by the Independent Faculty Members, of which he was a guiding force, is reference made to the possible interference with religious freedom. Nowhere in the interview published in the university newspaper or in his remarks to the faculty at Lakehead University, as one would have expected of someone who objected to the union on religious grounds, did Professor Jordan make reference to the potential for an infringement upon religious beliefs. He framed his remarks in terms of the impact of unionization upon professional standards. When given the opportunity to opt out of the paying of union dues on grounds of "affirmatively expressed religious belief or personal conviction" he chose the latter and the rationale which he put forward in support of his opting out is clearly related to professional rather than religious concerns. Regardless of whether Professor Jordan felt himself constrained to characterize his objection as one of personal conviction, because he was of the view that the term "affirmatively held religious belief" referred to the formal teaching of a church, the grounds for his objection, as set out in the document requesting an exemption, are not religious. They are professional and they are consistent with the tenor of his objection from the outset.

17. When the current collective agreement was negotiated shortly after section 46(2) of the Act was proclaimed, religious beliefs were the only basis upon which Professor Jordan could seek an exemption from the payment of union dues. In the absence of any evidence that Professor Jordan had relied upon religious belief in his long history of opposition to this union or had referenced his secular concerns to the teaching of the Bible, as he now does, we are not prepared to conclude that his present opposition to paying union dues, at a time when he is restricted in his grounds for objection to religious beliefs, is based upon religious conviction or belief. The evidence establishes that Professor Jordan sees the unionization of faculty as

incompatible with his concept of a university. We are satisfied on the evidence that his objection to paying union dues is motivated, not by what may be religious beliefs, but by his determination not to support an organization which he considers to be destructive to the university. Accordingly, this application is hereby dismissed.

DECISION OF BOARD MEMBER W.H. WIGHTMAN;

1. Unlike the majority, I would conclude that “determination not to support an organization which he considers to be destructive to the university” (para. 17 of the majority decision) to be an affirmative and logical expression of one whose religious beliefs preclude an individual from joining or supporting a trade union.

2. In light of the strictures imposed by the legislation itself, the fact that in opting out of dues payments under earlier agreements Professor Jordan alluded to “deep personal conviction”, (as opposed to “religious belief”), might have seemed to me a more persuasive basis for denying this application, except that the evidence seemed to indicate that his choice of grounds was no more reflective of his religious convictions than is the case when a profoundly religious individual chooses to “affirm” rather than be “sworn” for purpose of giving evidence.

3. As to Professor Jordan’s efforts to prevent unionization at York and other universities, one concludes that had he silently acquiesced to the organizing activity the majority might have granted his application.

4. There is an even stronger inference that had his words and writing invoked the Diety, as opposed to relying on appeals to the intellect, Professor Jordan’s petition might have succeeded. To this I would only say that it would seem logical for him to attempt, as he did, to appeal to academics with reasoned argument. He attempted to counter Professor Graniststein’s efforts at collectivization with the argument that putting a premium on mediocrity through the introduction of collective bargaining was not in the interests of the faculty, students or the university community in general. that he failed is evidenced by the certification of the Association, but that he should fail in this application seems to me a denial of the rights Professor Jordan is entitled to exercise under the *Labour Relations Act*. I would have granted the exemption.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING DECEMBER 1981

BARGAINING AGENTS CERTIFIED

No Vote Conducted

0122-80-R; 0123-80-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. Jean-Marc Lalonde Limited, carrying on business as Marché Lalonde, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent at Alfred, Ontario, save and except store managers, persons above the rank of store manager, corporate officers, meat department manager, office staff, persons regularly employed for not more than twenty-four hours a week and students employed during the school vacation period". (3 employees in unit). (*Do novo Hearing*).

Unit #2: "all employees of the respondent at Alfred, Ontario, regularly employed for not more than twenty-four hours a week and students employed during the school vacation period, save and except store managers, persons above the rank of store manager, corporate officers, meat department manager, and office staff". (3 employees in unit). (*De novo Hearing*).

2412-80-R: Ontario Public Service Employees Union, (Applicant) v. Cairness Community and 243220 Holdings Limited, carrying on business as "Digs for Kids", (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent working in or out of the Town of Caledon and the City of Brampton in the Regional Municipality of Peel and Town of Halton Hills in the Regional Municipality of Halton, save and except unit manager, persons above the rank of unit manager, Principal, Vice-Principal, Secretary to the Principal, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (41 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: "all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period working in or out of the Town of Caledon and the City of Brampton in the Regional Municipality of Peel and the Town of Halton Hills in the Regional Municipality of Halton, save and except unit manager, persons above the rank of unit manager, Principal, Vice-Principal, Secretary to the Principal and office staff". (22 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2447-80-R: United Cement Lime & Gypsum Workers International Union, (Applicant) v. Indusmin Limited, (Respondent) v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local Union 304, (Intervener).

Unit: "all owner-operators of tractor-trailers who are dependent contractors hauling materials from the respondent's Acton Quarry, Acton, Ontario, to job sites, save and except dispatcher, office staff and persons covered by subsisting collective agreements". (133 employees in unit). (*Having regard to the agreement of the parties*).

0728-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Rocket Carpentry & Contractors Ltd., (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 1190, (Intervener).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (8 employees in unit).

0774-81-R: Sheet Metal Workers' International Association, Local Union #285, (Applicant) v. Diversified Sheet Metal Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all journeyment sheet metal workers and registered sheet metal apprentices in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (12 employees in unit).

0899-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. M. D. D. Contracting Limited, M. D. D. Construction Limited, (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local Union 1190, (Intervener).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of M. D. D. Contracting Limited and M. D. D. Construction Limited in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (8 employees in unit).

0911-81-R: Canadian Union of Public Employees, (Applicant) v. St. Catharines Public Library Board, (Respondent).

Unit #1: "all employees of the respondent at all branches of the Library in the City of St. Catharines regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except the Director, Co-ordinator Central Library, Co-ordinator Acquisitions and Technical Services, Business Administrator, Department Heads including Building Superintendent, persons above the rank of Department Head, Secretary to the Director, Confidential Secretary to the Co-ordinator Central Library, Pages and persons covered by a subsisting collective agreement between the St. Catharines Public Library and the Canadian Union of Public Employees". (33 employees in unit).

Unit #2: "all employees of the respondent at all branches of the Library in the City of St. Catharines regularly employed as Pages, save and except the Director, Co-ordinator Central Library, Co-ordinator Acquisitions and Technical Services, Business Administrator, Department Heads including Building Superintendent, persons above the rank of Department Head, Secretary to the Director, Confidential Secretary to the Co-ordinator Central Library, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, and persons covered by a subsisting collective agreement between the St. Catharines Public Library and the Canadian Union of Public Employees". (45 employees in unit).

1017-81-R: Canadian Union of Public Employees, (Applicant) v. Villa Colombo Homes for the Aged Inc., (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except Professional Medical Staff, Registered and Graduate Nurses, Undergraduate Nurses, Office and Clerical Staff, Supervisors, persons above the rank of Supervisor, Recreation and Activation Supervisor and Volunteer Co-ordinator, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (51 employees in unit). (*Clarity Note*).

1052-81-R: The Canadian Union of Public Employees, (Applicant) v. Cradleship Creche of Metropolitan Toronto, (Respondent).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisor, persons above the rank of supervisor, assistant supervisor, office and clerical staff, private home daycare providers, persons employed by special grant, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period”. (20 employees in unit). (*Having regard to the agreement of the parties*).

1278-81-R: The Association of Allied Health Professionals: Ontario, (Applicant) v. Queensway-Carleton Hospital, (Respondent).

Unit: “all paramedical personnel of the respondent in the City of Nepean and the Ottawa Valley, save and except supervisors, persons above the rank of supervisor, students in training, interns, students employed during the school vacation period and persons covered by subsisting collective agreements”. (94 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1283-81-R: International Union of Operating Engineers Local 796, (Applicant) v. Hillel Lodge, (Respondent).

Unit #1: (*See Bargaining Agents Certified — Pre-Hearing Vote*).

Unit #2: “all office, clerical and co-ordinating employees of Hillel Lodge in Ottawa, save and except professional medical staff, registered nurses, graduate nurses, supervisors, foremen, persons above the rank of supervisor and foreman, persons employed for not more than twenty-four hours per week and students employed during the school vacation period”. (35 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1352-81-R: Canadian Paperworkers Union, (Applicant) v. Green Cedar Lumber Company Limited, (Respondent).

Unit: “all employees of the respondent in the District of Manitoulin, save and except foremen, persons above the rank of foreman, office and sales staff, students employed during their summer holidays and persons working less than twenty-four (24) hours per week”. (18 employees in unit). (*Having regard to the agreement of the parties*).

1354-81-R: United Steelworkers of America, (Applicant) v. Desmarais & Frere Ltd., (Respondent).

Unit: “all employees of the respondent at Mississauga, Ontario, save and except lead hands, persons above the rank of lead hand, office and sales staff, part-time employees and students employed during the school vacation period”. (36 employees in unit). (*Having regard to the agreement of the parties*).

1494-81-R: Service Employees Union, Local 478, (Applicant) v. Kirkland and District Hospital, (Respondent).

Unit #1: “all ambulance drivers and attendants employed by the respondent at Kirkland Lake, Ontario, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and person covered by subsisting collective agreements”. (6 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (*See Applications for Certification Subsequent to a Post-Hearing Vote*).

1554-81-R: United Brotherhood of Carpenters and Joiners of America, Local 2050, (Applicant) v. Stephen Jones Construction Limited; J. J. Construction Services; Four Seasons Interiors; Roselyn Construction Inc.; Dor-Mae Development Limited; Royvestco Inc., (Respondents).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters’ apprentices in the employ of the respondent in all other sectors in the County

of Grey, save and except non-working foremen and persons above the rank of non-working foreman". (5 employees in unit). (*Having regard to the agreement of the parties*).

1555-81-R: United Brotherhood of Carpenters and Joiners of America, Local 2050, (Applicant) v. Stephen Jones Construction Limited; J. J. Construction Services; Four Seasons Interiors; Roselyn Construction Inc.; Dor-Mae Development Limited; Royvestco Inc., (Respondents).

Unit: "all construction labourers, painters and painters' apprentices and plumbers and plumbers' apprentices in the employ of the respondents in the County of Grey, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (25 employees in unit). (*Having regard to the agreement of the parties*).

1556-81-R: Retail, Commercial & Industrial Union Local 206, (Applicant) v. Cambridge Leaseholds Ltd., (Respondent).

Unit #1: "(See Applications for Certification Dismissed Subsequent to a Post-Hearing Vote).

Unit: #2: "all employees of the respondent in the Regional Municipality of Niagara regularly employed for not more than twenty-four (24) hours per week, save and except supervisor, manager, persons above the rank of supervisor and office staff". (3 employees in unit). (*Having regard to the representations of the parties*).

1597-81-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Standard Group Ltd., (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the District of Kenora, including the Patricia portion, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

1598-81-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Robertson Building Systems Ltd., (Respondent) v. Sheet Metal Workers' International Assoc. Local Union 397, (Intervener).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the District of Kenora, including the Patricia portion, save and except non-working foremen and persons above the rank of non-working foreman". (2 employees in unit).

1724-81-R: United Food and Commercial Workers, Local 1000A, (Applicant) v. National Grocers Co. Ltd., (Respondent).

Unit #1: "all employees of the respondent at its retail store in the Town of Milton, Ontario, save and except store manager, persons above the rank of store manager, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (16 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at its retail store in the Town of Milton, Ontario, who are regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except store manager and persons above the rank of store manager". (9 employees in unit). (*Having regard to the agreement of the parties*).

1741-81-R: Ontario Public Service Employees Union, (Applicant) v. Can-Nu Enterprises Ltd. carrying on business as The Great Lakes College of Toronto, (Respondent) v. Group of Employees, (Objectors).

Unit: "All employees of the respondent in the Municipality of Metropolitan Toronto, save and except

Dean, Registrar, Vice-Principal, persons above the rank of Vice-Principal, maintenance staff and office and clerical staff". (34 employees in unit). (*Having regard to the agreement of the parties*).

1742-81-R: Canadian Union of Public Employees, (Applicant) v. Canadian Bureau for International Education, (Respondent).

Unit: "all employees of the respondent in Ottawa, Ontario, save and except Directors, persons above the rank of Director, accountant and students employed during the school vacation period". (12 employees in unit). (*Having regard to the agreement of the parties*).

1744-81-R: Hotel, Club, Restaurant, and Tavern Employees Union Local 261 Ottawa, Ontario, (Applicant) v. Citipark, Division of Citicom Inc., (Respondent).

Unit: "all employees of the respondent at Ottawa, Ontario, save and except supervisors, persons above the rank of supervisor, auditor, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (26 employees in unit). (*Having regard to the agreement of the parties*).

1745-81-R: United Steelworkers of America, (Applicant) v. Canadian Oxygen Limited, (Respondent).

Unit: "all office and clerical employees of the respondent at Ottawa, save and except supervisors, persons above the rank of supervisor, sales staff, secretary to the regional manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (9 employees in unit). (*Having regard to the agreement of the parties*).

1746-81-R: Canadian Union of Public Employees, (Applicant) v. Sudbury Public Library Board, (Respondent).

Unit: "all office, clerical and technical employees of the respondent in Sudbury, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except chief librarian, assistant chief librarian, department heads, secretary-administrative assistant, supervisor of buildings and maintenance and persons covered by subsisting collective agreement between the respondent and Canadian Union of Public Employees Local 207, dated 1st day of April 1980". (10 employees in unit). (*Having regard to the agreement of the parties*).

1752-81-R: Iron Workers District Council of Ontario and Iron Workers Union Local 721, (Applicant) v. Dantam Investments Limited, (Respondent).

Unit: "all reinforcing rodmen in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all reinforcing rodmen in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foreman". (2 employees in unit).

1761-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Marchant Property Management (A Division of Marchant & Company Ltd.), (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at "The Guildford", 3380 Eglinton Avenue East, Scarborough, Ontario, including resident superintendents, save and except property manager, office and clerical staff". (2 employees in unit). (*Having regard to the agreement of the parties*).

1779-81-R: United Steelworkers of America, (Applicant) v. Almag Aluminum Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Brampton, Ontario, save and except foremen, persons above

the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (11 employees in unit). (*Having regard to the agreement of the parties*).

1788-81-R: Local 1988, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Claude Vincent (1981) Lteé, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the County of Lanark, and the Townships of South Crosby, Bastard, Kitley, Wolford, Oxford (on Rideau) and South Gower and all lands north thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman". (2 employees in unit).

1794-81-R: Labourers' International Union of North America Local 527, (Applicant) v. Claude Vincent (1981) Lteé, General Contractors, (Respondent).

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the County of Lanark, and the Townships of South Crosby, Bastard, Kitley, Wolford, Oxford (on Rideau) and South Gower and all lands north thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman". (2 employees in unit).

1791-81-R: United Cement, Lime, Gypsum and Allied Workers International Union, (Applicant) v. Indusmin Limited, (Respondent).

Unit: "all employees of the respondent at its Halton Quarry at the Town of Milton, Ontario, save and except foremen, persons above the rank of foreman, dispatchers, office and sales staff and persons covered by subsisting collective agreements". (15 employees in unit). (*Having regard to the agreement of the parties*).

1803-81-R: Christian Labour Association of Canada, (Applicant) v. Sun Ray Solar Systems Limited, (Respondent).

Unit: "all employees of the respondent, employed in the City of Windsor, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (13 employees in unit). (*Having regard to the agreement of the parties*).

1804-81-R: International Brotherhood of Painters and Allied Trades Local Union 1891, (Applicant) v. Kingtown Painting & Decorating Ltd., (Respondent).

Unit: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters' apprentices in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (6 employees in unit).

1810-81-R: Local 47 Sheet Metal Workers' International Association, (Applicant) v. S and K Sheet Metal, (Respondent).

Unit: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeymen sheet metal workers and registered sheet metal apprentices in

the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman". (4 employees in unit).

1822-81-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Valley Foodmarts Ltd., (Respondent).

Unit: "all employees of the respondent in Chelmsford, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (13 employees in unit). (*Having regard to the agreement of the parties*).

1837-81-R: Hotel, Restaurant and Cafeteria Employees Union, Local 75, (Applicant) v. Beaver Foods Limited, (Respondent).

Unit: "all employees of the respondent at Scarborough College, Scarborough, Ontario, save and except supervisors, persons above the rank of supervisor, head chef, sales and office staff and students employed during the school vacation period". (26 employees in unit). (*Having regard to the agreement of the parties*).

1842-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Harry Toddglan Construction Limited, (Respondent).

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (16 employees in unit).

1854-81-R: United Steelworkers of America, (Applicant) v. Courtice Steel Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent employed in Cambridge, Ontario, save and except foremen, persons above the rank of foreman, office, sales and clerical staff, laboratory technicians, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (64 employees in unit). (*Having regard to the agreement of the parties*).

1855-81-R: Algoma University College Support Staff Association, (Applicant) v. Algoma College Association, (Respondent).

Unit: "all office, clerical and technical employees of the respondent in Sault Ste. Marie, Ontario, save and except the dean, registrar and assistant registrar, business manager, chairman of the board of trustees, chief librarian, director of athletics, plant superintendent, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period, and persons covered by a subsisting collective agreement". (23 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1877-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. 415542 Ontario Limited, trading as L & S Trimmers, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (7 employees in unit).

1878-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Sanjor Construction and Carpentry Ltd., (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (12 employees in unit).

1879-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Fausto Carpentry & Contracting Limited, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (4 employees in unit).

1880-81-R: Christian Labour Association of Canada, (Applicant) v. Caressant Care Nursing Home of Canada Limited c.o.b. as Caressant Care Nursing Home, (Respondent).

Unit: "all employees of the respondent at Lindsay, Ontario, save and except supervisors and persons above the rank of supervisor, registered and graduate nurses, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (8 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1882-81-R: Canadian Union of Public Employees, (Applicant) v. The Corporation of the Town of Collingwood, (Respondent).

Unit: "all employees of the respondent save and except office and clerical staff, foremen, supervisors, persons above the rank of foreman and supervisor, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements". (4 employees in unit). (*Having regard to the agreement of the parties*).

1889-81-R: Retail, Wholesale and Department Store Union, AFL:CIO: CLC:, (Applicant) v. Data Ribbon Limited, (Respondent).

Unit: "all employees of the respondent in the City of Ottawa, save and except production manager, those above the rank of production manager, office and sales staff". (9 employees in unit). (*Having regard to the agreement of the parties*).

1890-81-R: United Steelworkers of America, (Applicant) v. B and B Maintenance and Repair Company, (Respondent).

Unit: "all employees of the respondent in the Township of Pickering, save and except foremen, persons above the rank of foreman, office and sales staff". (4 employees in unit). (*Having regard to the agreement of the parties*).

1905-81-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 3227 and 3233, United Brotherhood of Carpenters' and Joiners of America, (Applicant) v. Bonfield Construction Co. Ltd., (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of

Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (4 employees in unit).

1912-81-R: Ontario Public Service Employees Union, (Applicant) v. VS Services Ltd., (Respondent).

Unit: "all employees of VS Services Ltd. at St. Clair College of Applied Arts and Technology in the City of Windsor, save and except food service managers, persons above the rank of food service manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (21 employees in unit). (*Having regard to the agreement of the parties*).

1926-81-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Humpty Dumpty Foods Limited, (Respondent).

Unit: "all driver-salesmen of the respondent working at or out of Whiteby, Ontario, save and except supervisors and persons above the rank of supervisor". (2 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1944-81-R: United Brotherhood of Carpenters & Joiners of America Local 1256, (Applicant) v. Gilbert Construction (1981) Limited, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the County of Lambton, save and except non-working foremen and persons above the rank of non-working foreman". (2 employees in unit).

1953-81-R: International Brotherhood of Painters and Allied Trades — Local Union 1891, (Applicant) v. Paolo Painting, (Respondent).

Unit: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters' apprentices in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (4 employees in unit).

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

1283-81-R: International Union of Operating Engineers Local 796, (Applicant) v. Hillel Lodge, (Respondent).

Unit #1: "all lay employees of Hillel Lodge in Ottawa, save and except professional medical staff, registered nurses, graduate nurses, supervisors, foremen, persons above the rank of supervisor and foreman, office, clerical and co-ordinating staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (35 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of person on list as originally prepared by employer	39
Number of persons who cast ballots	32
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	28
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	27

Number of ballots marked against applicant	0
Ballots segregated and not counted	4

Unit #2: (*See Bargaining Agents Certified-No Vote Conducted*).

1564-81-R: United Food and Commercial Workers International Union, Local 725, AFL-CIO-CLC, (Applicant) v. Holiday Inn, Oshawa of the Commonwealth Holiday Inns of Canada Limited, (Respondent) v. Hotel, Restaurant & Cafeteria Employees Union, Local 75, (Intervener).

Unit: #1: "all employees of the respondent at the Holiday Inn, Oshawa, save and except supervisors, persons above the rank of supervisor, office and sales staff, including front desk clerks, front desk cashiers, payroll clerks, accounting clerks, audit department staff, secretaries, security staff, persons regularly employed for not more than sixteen (16) hours per week and students employed during the school vacation period". (41 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	70
Number of persons who cast ballots	61
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	58
Number of ballots marked in favour of intervener	0

Unit #2: (*See Applications for Certification Dismissed — Pre-Hearing Vote*).

1688-81-R: International Union of Operating Engineers, Local 796, (Applicant) v. The Wellesley Hospital, (Respondent) v. Canadian Union of Operating Engineers and General Workers, (Intervener #1) v. Ontario Public Service Employees Union, (Intervener #2).

Unit: "all stationary engineers, hospital equipment maintenance men and helpers who work under these classifications employed by the Wellesley Hospital at its hospital in Metropolitan Toronto, save and except supervisors, those persons above the rank of supervisors, office employees and those persons covered by a subsisting agreement between the Hospital and the Service Employees Union". (17 employees in unit). (*Having regard to the agreements of the parties*).

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	17
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	13
Number of ballots marked in favour of intervener #1	2
Ballots segregated and not counted	1

1734-81-R: United Steelworkers of America, (Applicant) v. M. Zagerman and Company Limited, (Respondent) v. Labourers' International Union of North America, Local 527, (Intervener).

Unit: "all employees of the respondent at Ottawa, save and except foremen, persons above the rank of foreman, office and sales staff, students employed during the school vacation period, and persons covered by the subsisting collective agreement between M. Zagerman & Co. Ltd. and the International Association of Bridge, Structural and Ornamental Ironworkers, Local 765, dated May 1, 1969". (56 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	57
Number of persons who cast ballots	52
Number of ballots marked in favour of applicant	47
Number of ballots marked in favour of intervener	5

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

2709-80-R: Ontario Nurses' Association, (Applicant) v. The Great War Memorial Hospital of Perth District, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent in Perth, Ontario, save and except Head Nurses, persons above the rank of Head Nurse, Discharge Planning Co-ordinator, in-Service Co-ordinator, Employee Health Nurse and Infection Control Officer, and nurses regularly employed for not more than twenty-four hours per week". (14 employees in unit).

Number of names of persons on revised voters' list		29
Number of persons who cast ballots		28
Number of ballots marked in favour of applicant	16	
Number of ballots marked against applicant	11	
Ballots segregated and not counted	1	

Unit #2: "all registered and graduate nurses regularly employed in a nursing capacity for not more than twenty-four hours per week by the respondent in Perth, Ontario, save and except Head Nurses, persons above the rank of Head Nurse, Discharge Planning Co-ordinator, In-Service Co-ordinator, Employee Health Nurse and Infection Control Officer". (9 employees in unit).

Number of names of persons on revised voters' list		28
Number of persons who cast ballots		24
Number of ballots marked in favour of applicant	13	
Number of ballots marked against applicant	10	
Ballots segregated and not counted	1	

2762-80-R: United Food and Commercial Workers International Union, Local 1000A, (Applicant) v. Jack Colden Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at its store in Kingston West who are regularly employed for not more than twenty-four hours per week, save and except assistant store manager, persons above the rank of assistant store manager, personnel manager and office staff". (26 employees in unit).

Number of names of persons on revised voters' list		67
Number of persons who cast ballots		62
Number of ballots marked in favour of applicant	32	
Number of ballots marked against applicant	30	

1494-81-R: Service Employees Union, Local 478, (Applicant) v. Kirkland and District Hospital, (Respondent).

Unit #1: (*See Bargaining Agents Certified — No Vote Conducted*).

Unit #2: "all ambulance drivers and attendants of the respondent at Kirkland Lake, Ontario, regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor, and persons covered by subsisting collective agreements". (2 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		2
Number of persons who cast ballots		2
Number of ballots marked in favour of applicant	2	
Number of ballots marked against applicant	0	

1664-81-R: Canadian Union of Public Employees, (Applicant) v. The Doctors Hospital, (Respondent) v. Group of Employees, (Objectors).

Unit: "all office and clerical employees of the respondent in Toronto, save and except supervisors, persons above the rank of supervisor, secretaries to the Director of Nursing Services, Assistant

Executive Director (Human Resources), Chief of Staff and Medical Advisory Committee, Assistant Executive Director (Patient and Environmental Service), Controller, Interpreter, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, and persons covered by subsisting collective agreements". (55 employees in unit). (*Clarity Note*).

Number of names of persons on list as originally prepared by employer		56
Number of persons who cast ballots		56
Number of of ballots marked in favour of applicant	28	
Number of ballots marked against applicant	27	
Ballots segregated and not counted	1	

1722-81-R: Canadian Union of Public Employees, (Applicant) v. Kingston and District Association for the Mentally Retarded, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Kingston, Ontario, save and except supervisors, persons above the rank of supervisor, office and clerical staff, financial officer, family support co-ordinator, job placement counsellor, students employed during the school vacation period and persons regularly employed for not more than twenty-four (24) hours per week". (23 employees in unit).

Number of names of persons on revised voters' list		18
Number of persons who cast ballots		15
Number of ballots marked favour of applicant	11	
Number of ballots marked against applicant	4	

Applications for Certification Dismissed — No Vote Conducted

2000-80-R: The Carpenters District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Disney Display (a division of Intex Trade and Consumer Shows Limited), (Respondent).

0401-81-R: Labourers' International Union of North America Ontario Provincial District Council, (Applicant) v. Bandiera Associates, Limited, (Respondent).

1014-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. M.D.D. Construction Limited, (Respondent) v. Labourers' International Union of North America, Local 183, (Intervener).

1207-81-R: Energy and Chemical Workers Union, (Applicant) v. Dow Chemical of Canada, Limited, (Respondent) v. Group of Employees, (Objectors).

1656-81-R: Mutuel Employees' Association Local 528, Service Employees' International Union, (Applicant) v. Flamboro Downs Limited, (Respondent).

1665-81-R: Ontario Nurses' Association, (Applicant) v. Cochrane District Homes for the Aged, (Respondent).

1691-81-R: Service Employees Union, Local 210 Affiliated with Service Employees International Union, AFL-CIO-CLC, (Applicant) v. R. G. MacLeaod Consultants Inc., (Respondent).

1706-81-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Anthes Equipment Limited, (Respondent).

1713-81-R: Canadian Union of Operating Engineers & General Workers, (Applicant) v. The Corporation of the Town of Orangeville, (Respondent).

1778-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Greenwin Property Management, (Respondent) v. The Canadian Union of Public Employees, (Intervener).

1787-81-R: Labourers' International Union of North America Local 247, (Applicant) v. Taggart Construction Limited, (Respondent).

1848-81-R: International Molders & Allied Workers Union, (Applicant) v. Badger Manufacturing, (Respondent) v. Group of Employees, (Objectors).

1888-81-R: Canadian Union of Public Employees, (Applicant) v. Bruce County Board of Education, (Respondent).

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

1380-81-R: United Steelworkers of America, (Applicant) v. Associated Tube Industries Ltd., (Respondent).

Unit: "all employees of the Respondent, at its stainless steel tubes and tubular related parts facility, Woodbine Avenue, in the Regional Municipality of York, save and except foremen and supervisors, persons above the rank of foreman, supervisor, office and sales staff, Engineering and Technical staff including Production Control Staff, students employed during the school vacation and students employed on a co-operative basis with a University or Community College". (252 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		251
Number of persons who cast ballots	237	
Number of ballots marked in favour of applicant	102	
Number of ballots marked against applicant	135	

1525-81-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Sterling Automotive Supplies Inc., (Respondent).

Unit: "all employees of the respondent working in Windsor, Ontario save and except foremen, those above the rank of foreman, office and sales staff". (9 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters list		10
Number of persons who cast ballots	10	
Number of ballots marked in favour of applicant	5	
Number of ballots marked against applicant	5	

1564-81-R: United Food and Commercial Workers International Union, Local 725, AFL-CIO-CLC, (Applicant) v. Holiday Inn, Oshawa of the Commonwealth Holiday Inns of Canada Limited, (Respondent) v. Hotel, Restaurant & Cafeteria Employees Union, Local 75, (Intervener).

Unit #1: (*See Bargaining Agents Certified — Pre-Hearing Vote*).

Unit #2: "all employees of the respondent at the Holiday Inn, Oshawa, save and except supervisors,

persons above the rank of supervisor, secretary to the general manager, security staff, sales manager, sous chef, assistant housekeeper and all employees covered by a subsisting collective agreement between the respondent and the intervener". (122 employees in unit).

Number of names of persons on revised voters' list		44
Number of persons who cast ballots	30	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	12	
Number of ballots marked against applicant	17	

1655-81-R: Mutuel Employees' Association, Local 528, Service Employees' International Union, (Applicant) v. Flamboro Downs Holdings Limited, (Respondent).

Unit: "all employees of the respondent employed in the mutuels department at Flamboro Downs racetrack at Dundas, Ontario, save and except head cashiers, supervisors, assistant managers, persons above the ranks of head cashier supervisor, and assistant manager, data processing operators, office and sales staff". (127 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		127
Number of persons who cast ballots	119	
Number of ballots marked in favour of applicant	46	
Number of ballots marked against the applicant	73	

1668-81-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Carrier Canada Limited, (Respondent) v. Sheet Metal Workers' Int. Assoc., Local Union 575, (Intervener).

Unit: "all employees of the Respondent at its Brampton, Ontario Plant, save and except foremen, working supervisors in maintenance, receiving, stores and shipping departments, clerical, office and sales staff, those above the rank of foreman, confidential employees and all supervisory employees with authority to hire, promote, discharge or otherwise effect changes in the status of employees or effectively recommend such action, and except all employees in bargaining unit or units for which other unions are the bargaining agents". (238 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		224
Number of persons who cast ballots	212	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	83	
Number of ballots marked in favour of intervener	128	

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

0644-81-R: United Textile Workers of America, (Applicant) v. Catfish Calhoun Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at St. Catharines, Ontario, save and except foremen, those above the rank of foreman, office staff, wholesale sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (64 employees in unit).

Number of names of persons on list as originally prepared by employer		64
Number of persons who cast ballots	63	
Number of ballots marked in favour of applicant	21	

Number of ballots marked against applicant	41
Ballots segregated and not counted	1

1394-81-R; 1395-81-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Norfolk-Haldimand Regional Nursing Home, a division of Little's Nursing Home (Essex) Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of Norfolk Haldimand Regional Nursing Home at Port Dover, Ontario, save and except supervisors, persons above the rank of supervisor, professional nursing staff, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (27 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	20
Number of persons who cast ballots	19
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	9
Ballots segregated and not counted	1

Unit #2: "all employees of Norfolk Haldimand Regional Nursing Home at Port Dover, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, professional nursing staff and office staff". (27 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	13
Number of persons who cast ballots	11
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	6
Ballots segregated and not counted	2

1458-81-R: Service Employees Union, Local 204 affiliated with A.F. of L., C.I.O., C.L.C., (Applicant) v. K Mart Canada Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of K Mart Canada Limited employed at Shoppers World — Albion Mall, in the Municipality of Etobicoke, Ontario, regularly employed for not more than twenty — four (24) hours per week and students employed during the school vacation period, save and except department managers, persons above the rank of department manager, management trainees, pharmacists and persons covered by certificate issued by the Ontario Labour Relations Board, File #1171-81-R". (65 employees in unit).

Number of names of persons on revised voters' list	68
Number of persons who cast ballots	58
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	37

1556-81-R: Retail, Commercial & Industrial Union Local 206, (Applicant) v. Cambridge Leaseholds Ltd., (Respondent).

Unit #1: "all employees of the respondent in the Regional Municipality of Niagara, save and except supervisor, manager, persons above the rank of supervisor, office staff, and persons regularly employed for not more than twenty-four (24) hours per week". (3 employees in unit). (*Having regard to the representations of the parties*).

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	3

Unit #2: (*See Bargaining Agents Certified — No Vote Conducted*).

APPLICATIONS FOR CERTIFICATION WITHDRAWN

1754-81-R: Muskoka Steel Fabricators Association (Applicant) v. McEwan Tougard Industries Ltd., (Respondent).

1771-81-R: Hotel, Restaurant and Cafeteria Employees Union Local 75, (Applicant) v. Whalers Wharf Restaurant, (Respondent).

1843-81-R: United Steelworkers of America, (Applicant) v. C. H. Heist Industrial Services Limited, (Respondent).

1844-81-R: Service Employees Union, Local 478, (Applicant) v. Waldheim Nursing Home Ltd., (Respondent).

1862-81-R: Service Employees Union, Local 219 A.F. of L., C.I.O., C.L.C., (Applicant) v. Lyndon Security Guard Service, (Respondent).

1881-81-R: Christian Labour Association of Canada, (Applicant) v. Caressant Care Nursing Home of Canada Limited, (Respondent).

1949-81-R: Service Employees International Union Local 268, (Applicant) v. The Lake Superior Board of Education, (Respondent).

SALE OF A BUSINESS

1529-81-R: Labourers' International Union of North America, Local 527, (Applicant) v. Hugh M. Grant Limited and the Clarkson Company Limited, Receiver and Manager of Hugh M. Grant Limited. (*Withdrawn*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0447-81-R: William J. Weller, (Applicant) v. Canadian Paperworkers Union and its Local 1144, (Respondent) v. Beacon Envelopes, A Division of Barbecon Incorporated, (Intervener). (*Withdrawn*).

1175-81-R: Vick Diorenzo, (Applicant) v. United Electrical, Radio and Machine Workers of America and its Local 512, (Respondent) vs. Matsushita Industrial Canada Limited, (Intervener).

Unit: "all employees of the intervener at its plant at 1457 The Queensway, Toronto, Ontario, or any other television plant within the Municipality of Metropolitan Toronto, save and except forepersons and supervisors, persons above the rank of foreperson and supervisor, office and support staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (*Granted*).

Number of names of persons on revised voters' list		230
Number of names of persons who cast ballots		230
Number of spoiled ballots	3	
Number of ballots marked in favour of respondent	87	
Number of ballots marked against respondent	140	

1273-81-R: Chris Martin, (Applicant) v. Sheet Metal Workers Union, (Respondent) v. Flexonics Division, UOP Limited, (Intervener).

Unit: "all employees of the company in its Flexonics Division at Brampton, Ontario, save and except sub-foremen, persons above the rank of sub-foreman, and office staff" (*Dismissed*).

Number of names of persons on list as originally prepared by employer	60
Number of names of persons on revised voters' list	60
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	38
Number of ballots marked against respondent	21

1410-81-R: Oliver MacLeod. (Applicant) v. Teamsters Local Union No. 879, (Respondent) v. Pitt Steel Limited, carrying on business as Wimco Steel Sales Co.

Unit: "all truck drivers employed by the intervener working in or out of its 1218 South Service Road West plant in Oakville, Ontario, save and except foremen, persons above the rank of foreman and persons regularly employed for not more than 24 hours per week." (*Granted*).

Number of persons on list as originally prepared by employer	17
Number of persons who cast ballots	15
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	12

1456-81-R: John Biggins, James Greig, Robert Harvey, Helmut Schwarze, William J. Taylor, Osvald Tuulik, Roy Thompson, Hugh McBryde, Michael Roe, Peter Jung, Donald F. Philpot, Steve Adamov, Brenda Shelvey, Ailsa Moszgay, Marvin Freedman, J. H. McNair, W. Dalziel, J. W. Irons, J. R. Stickland, D. A. Stevens, A. A. Webb, W. B. Abbott, S. Chan, H. Stauffert, T. W. Allison, Brian S. Cable, L. J. Krzyanowski, Alan Biggerstaff, B. W. Rose, Fred Primmer, Peter C. T. Pilcher, Jack Barker, David Harrison, Len Perrone, Norman F. Dickinson, David N. Pim, John P. Kahn, Henry De Vries, Douglas P. Bromley, Roland M. McLaren, John Glendinning, Gordon V. De'Ath, Alan J. Warren, Susan Ellams, Paul Livingston, Barbara Starzynski and J. Gary Aldred, (Applicants) v. International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (U. A. W.) Local 673, (Respondent).

Unit: "all office and clerical employees of De Havilland Aircraft of Canada Limited in its main plant and engine division, Toronto, save and except section heads, persons above the rank of section head, one secretary to each department manager or to a person of higher status, draughtsmen in any department, and persons of higher status than draughtsmen in the engineering departments, registered nurses, buyers, senior cost estimators, technical writers and illustrators, field service representatives, subcontract placement officers, liaison officers, teletype operator, the executive chauffeur, clerks assigned to the confidential payroll composed of persons not employed within the scope of any bargaining unit, and all employees engaged in the industrial relations department including personnel engaged in plant security and protection." (*Dismissed*).

1553-81-R: John Bissonnette. (Applicant) v. Local 34 Energy and Chemical Workers Union (Canadian Chemical Workers Union), (Respondent) v. Bally Refrigeration of Canada Refrigeration, (Intervener).

Unit: "all employees of Bally Refrigeration of Canada in Brockville, Ontario, save and except the foremen, persons above the rank of foreman, office, sales and technical staff, and students." (*Granted*).

Number of names of persons on list as originally prepared by employer	26
Number of persons who cast ballots	26
Number of ballots marked in favour of respondent	5
Number of ballots marked against respondent	21

1573-81-R: Yvan David, Guy Dumas and Wilfred Prindiville on behalf of a group of employees, (Applicants) v. Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 91, (Respondent) v. P. L. S./Mac's Delivery Service, (Intervener).

Unit: "all employees of P. L. S./Mac's Delivery Service in Ottawa, Ontario, save and except head mechanics, foremen, and those above the ranks of head mechanic and foreman, office and sales staff, regularly employed for not more than twenty-four (24) hours per week, and students employed during vacation period, and any other classifications as specified in the certificate issued by the Ontario Labour Relations Board." (*Granted*).

1686-81-R: William Krezanowski, (Applicant) v. United Food and Commercial Workers International Union, Region 18-AFL-CIO, affiliated with the Canadian Labour Congress, (Respondent) v. Stokely-Van Camp of Canada (Intervener). (*Dismissed*).

1715-81-R: Coralie Snellie, Vishnu Baldeosingh, (Applicants) v. U. A. W. Local 1285, (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

1577-81-U: Westeel Rosco Limited, (Applicant) v. United Steelworkers of America and its Local 6448, John Fitzpatrick and Richard Vaughan, (Respondents). (*Granted*).

1735-81-U: Wilputte Canada, Inc., (Applicant) v. Local 1036, Labourers' International Union of North America, and Jimmie Lewis, (Respondent) (*Withdrawn*).

2003-81-U: General Bakeries Limited, (Applicant) v. Bakery Confectionery and Tobacco Workers' International Union of America, Local 264 and Gerry Eisentraut, (Respondents). (*Granted*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0096-80-U: Ronald Gougen, Blake Bath et al, (Complainants) v. Labourers International Union of North America Local 506 and Officers M. Gargaro and S. G. Cragg, (Respondents) v. Exhibit & Display Association of Canada, (Intervener). (*Withdrawn*).

1561-80-U: Canada Cement LaFarge Ltd., (Complainant) v. United Cement, Lime & Gypsum Workers International Union and its Local 368, (Respondents). (*Granted*).

1886-80-U & 2052-80-U: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. St. Thomas Sanitary Collective Service Limited, (Respondent). (*Granted*).

0679-81-U: Balwant Singh Bhooi, (Complainant) v. United Steelworkers of America, Local 3252, (Respondent). (*Dismissed*).

0824-81-U: Local P767, United Food & Commercial Workers International Union, AFL-CIO-CLC, (Complainant) v. Canadian Home Products Limited, (Respondent). (*Withdrawn*).

0919-81-U: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. G. Tackaberry & Sons Construction Co. Ltd., (*Withdrawn*).

1221-81-U: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Fowler Construction Co. Limited, (Respondent). (*Terminated*).

1311-81-U: Canadian Union of Public Employees and its Local 2558, (Complainant) v. Bingham Memorial Hospital at Matheson, (Respondent). (*Withdrawn*).

1350-81-U: Canadian Paperworkers Union, (Complainant) v. Green Cedar Lumber Company, a Division of General Trading Company, (Respondent). (*Withdrawn*).

1409-81-U: United Steelworkers of America, (Complainant) v. Baltimore Aircoil Interamerican Corporation, (Respondent). (*Withdrawn*).

1500-81-U: Hotel, Restaurant & Cafeteria Employees Union, Local 75, (Complainant) v. Constellation Hotel Corporation Ltd., (Respondent). (*Dismissed*).

1522-81-U: Joanne D-Amore, (Complainant) v. Allen Industries and Larry Cooke (Respondents). (*Dismissed*).

1527-81-U: Shopmen's Local Union No. 834 of the International Association of Bridge, Structural and Ornamental Ironworkers, (Complainant) v. Rapistan Systems Limited and William Miln, (Respondent). (*Withdrawn*).

1535-81-U: Retail, Commercial & Industrial Union, Local 206 Chartered by United Food & Commercial Workers International Union, (Complainant) v. Comstock Funeral Home Ltd., (Respondent). (*Granted*).

1539-81-U: United Electrical, Radio and Machine Workers of America (UE), (Complainant) v. Speedex Company, Division of Magna International Inc. (Respondent). (*Dismissed*).

1583-81-U: International Woodworkers of America, Local 2-600, (Complainant) v. Amoco Fabrics Ltd., (Respondent). (*Withdrawn*).

1608-81-U: Energy and Chemical Workers Union, (Complainant) v. Resco Chemical and Colour Limited (Respondent). (*Withdrawn*).

1667-81-U: United Electrical, Radio and Machine Workers of America (UE), (Complainant) v. Speedex Manufacturing, a Division of Magna International Inc., (Respondent). (*Withdrawn*).

1683-81-U: Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Sterling Automotive Supplies Inc., (Respondent). (*Withdrawn*).

1684-81-U: Teamsters, Chaufferus, Warehousemen and Helpers of America, Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Sterling Automotive Supplies Inc., (Respondent). (*Withdrawn*).

1697-81-U: Iqbal Choudhry, (Complainant) v. Hotel Restaurant and Cafeteria Employees Union, Local 75, Toronto of the Hotel and Restaurant Employees and Bartenders International Union AFL-CIO-CLC, (Respondent) v. Nags Head Tavern, (Intervener). (*Dismissed*).

1705-81-U: Service Employees Union Local 210, (Complainant) v. R. G. MacLeod Constultants Inc., (Respondent). (*Withdrawn*).

1728-81-U: United Steelworkers of America, (Complainant) v. Homeware Industries Limited (Beaverton Division), (Respondent). (*Withdrawn*).

1747-81-U: Frank Bruni, (Complainant) v. Robert Wallace, (Respondent). (*Withdrawn*).

1753-81-U: Stephen Morvay, (Complainant) v. Metropolitan Toronto Civic Employees Union, Local 43, (Respondent) v. City of Toronto, (Intervener). (*Withdrawn*).

1759-81-U: Roy Jones, (Complainant) v. Teamsters Local 938, (Respondent). (*Withdrawn*).

1760-81-U: Mr. Luke Dinardo, (Complainant) v. United Automobile Workers' of America, Local 124 and Crothers Limited (Respondent). (*Withdrawn*).

1764-81-U: Peter Cizikas, (Complainant) v. United Food and Commercial Workers International Union, (Respondent). (*Withdrawn*).

1765-81-U: Peter Cizikas, (Complainant) v. Maple Leaf Mills Limited (West Toronto Plant), (Respondent). (*Terminated*).

1766-81-U: The United Brotherhood of Carpenters and Joiners of America, Local Union 3054, (Complainant) v. Huromic Metal Industries Ltd., (Respondent). (*Withdrawn*).

1772-81-U: United Brotherhood of Carpenters and Joiners of America Local Union 3054, (Complainant) v. Continental Cabinet Company Inc., (Respondent). (*Withdrawn*).

1773-81-U: Jeno Gabris, (Complainant) v. Canadian Transportation Workers Union, Local No. 166, National Council of Canadian Labour, (Respondent) v. Listowel Transport Lines Limited, (Intervener). (*Dismissed*).

1776-81-U: Mrs. Edith Wallace, (Complainant) v. John Tregiani, (Respondent). (*Withdrawn*).

1799-81-U: Health, Office & Professional Employees, Local 1976, chartered by United Food & Commercial Workers International Union, (Complainant) v. Coleman Health Care Centre, (Respondent). (*Withdrawn*).

1801-81-U: John Palermo, (Complainant) v. International Brotherhood of Teamsters Local 424, (Respondent) v. Darling & Company Ltd., (Intervener). (*Dismissed*).

1816-81-U: Joseph Fiorillo, (Complainant) v. Local 280 Bartenders & Waiter Union, (Respondent). (*Withdrawn*).

1819-81-U: United Food and Commercial Workers International Union, Local 1000A, (Complainant) v. Knob Hill Farms, (Respondent). (*Withdrawn*).

1824-81-U: Louie Antongiovanni, (Complainant) v. United Food and Commercial Workes Int. and A & P, (Respondents). (*Withdrawn*).

1826-81-U: International Union of Allied Novelty & Production Workers, Local 905, (Complainant) v. Canadian Atlas Furniture Mfg. Ltd. (Respondent). (*Withdrawn*).

1827-81-U: International Union of Allied Novelty & Production Workers, Local 905, (Complainant) v. Canadian Atlas Furniture Mfg. Ltd. (Respondent). (*Withdrawn*).

1828-81-U: International Union of Allied Novelty & Production Workers, Local 905, (Complainant) v. Canadian Atlas Furniture Mfg. Ltd. (Respondent). (*Withdrawn*).

1829-81-U: International Union of Allied Novelty & Production Workers, Local 905, (Complainant) v. Canadian Atlas Furniture Mfg. Ltd. (Respondent). (*Withdrawn*).

1830-81-U: International Union of Allied Novelty & Production Workers, Local 905, (Complainant) v. Canadian Atlas Furniture Mfg. Ltd. (Respondent). (*Withdrawn*).

1831-81-U: International Union of Allied Novelty & Production Workers, Local 905, (Complainant) v. Canadian Atlas Furniture Mfg. Ltd. (Respondent). (*Withdrawn*).

1832-81-U: International Union of Allied Novelty & Production Workers, Local 905, (Complainant) v. Canadian Atlas Furniture Mfg. Ltd. (Respondent). (*Withdrawn*).

1851-81-U: Labourers' International Union of North America, Local 183, (Complainant) v. Marchant Property Management (A Division of Marchant & Company Ltd.), (Respondent). (*Withdrawn*).

1852-81-U: Sheet Metal Workers' International Association Local Union 47, (Complainant) v. Metroheat Inc., (Respondent). (*Withdrawn*).

1857-81-U: International Union of Allied Novelty & Production Workers, Local 905, (Complainant) v. Canadian Atlas Furniture Mfg. Ltd. (Respondent). (*Withdrawn*).

1861-81-U: International Union of Bricklayers and Allied Craftsmen, Local 12, (Complainant) v. Authentic Stone & Brick Products Ltd. (Respondent). (*Withdrawn*).

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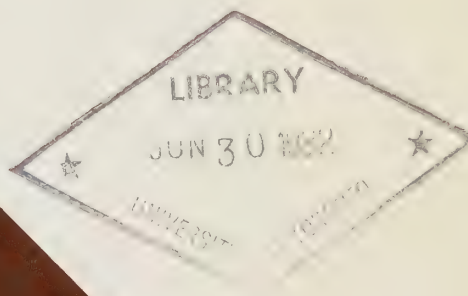
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1790-81-R United Steelworkers of America, Applicant, v. Conair Canada Limited, Respondent, v. Group of Employees, Objectors.

Charges – Membership Evidence – Petition – Whether membership evidence obtained by coercion or misrepresentation – Whether petition supported by management

BEFORE: R.O. MacDowell, Vice-Chairman, and Board Members C.G. Bourne and B. Armstrong.

APPEARANCES: *Brian Shell and Gaye Lamb for the applicant; W. R. Herridge and K. Lee for the respondent; Raymond Taggart and Michael C. Bullen for the objectors.*

DECISION OF THE BOARD; February 18, 1982

I

1. This is an application for certification.

• • •

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

4. The Board finds that all employees of the respondent in the Township of West Gwillimbury, save and except foremen, persons above the rank of foremen, office and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. In support of this application for certification, the trade union filed documentary evidence of membership on behalf of two-thirds of the employees in the bargaining unit. This documentary evidence took the form of membership cards which include a combination application for membership and an attached receipt. The membership and receipt portion of these cards is signed by the individual employee concerned, and the document is also signed by the individual soliciting his support ("the collector") to verify that the proper signature and one dollar payment have been secured. All of the cards indicate that a payment of one dollar has been made, and the documentary evidence is supported by a properly completed Form 9, statutory declaration concerning the regularity of the membership material. The membership evidence was all filed by the "terminal date" fixed pursuant to section 103 of the Act, and save for the card of Gerald Fesiuk (which we will deal with below at some length), there is no allegation and, in our view, no evidence, of impropriety in the solicitation of the union's membership evidence. Accordingly, if this documentary evidence were the only material before it, the Board would be disposed, pursuant to section 7(2) of the Act, to certify the applicant without recourse to a representation vote.

6. However, there were also filed with the Board three statements of desire or "petitions", signed by certain employees and indicating that they wished to oppose the applicant's certification. These statements included the names of some individuals who had previously signed membership cards, which in form and content indicate that they were "members" of the union, as that term is defined in section 1(1)(1) of the Act. These members had had a purported change of heart, and now allegedly no longer wished to support the union's application for certification. In addition, Gerald Fesiuk alleged that his support for

the union had been obtained by intimidation or coercion. Counsel for the respondent argued that these allegations were of sufficient gravity to prompt the Board to seek the confirmatory evidence of a representation vote.

7. In view of the allegations of misconduct levelled against the union by Mr. Fesiuk, and the purported change of heart by persons who had previously signed union membership cards, the Board scheduled a hearing to inquire into both matters. The Board also entertained evidence tendered by the union concerning the activities of certain of the respondent's managerial personnel, which, it was submitted, cast real doubt on the weight to be accorded to both the petitions and Fesiuk's charges.

8. The hearing before the Board consumed some three days and, while we do not think any useful purpose would be served by recounting all of the testimony, it will be necessary to consider some of it in some detail. As will become apparent, our decision in this case ultimately depends upon our findings of credibility and the weight which, in our view, should be accorded to the various statements of desire.

9. For the purpose of exposition it will be convenient to deal separately with the petitions and Fesiuk's allegations of union intimidation — although the evidence is interrelated to some extent, and we must consider its cumulative effect.

II

10. Statements of desire or "petitions" are not regulated by the Act as directly or precisely as union membership evidence. There is no statutory definition equivalent to section 1(1)(1), nor is there any requirement for a monetary payment (in the nature of consideration), or for a confirmatory statutory declaration similar to Form 9. However, the possibility of employee objections appears to be contemplated by section 103(2)(1) and the Rule 73 of the Rules of Practice; and in any event, the Board has a long-established practice of considering such petitions when exercising its authority and discretion under section 7 of the Act. But the Board must be satisfied that when union members sign a petition evidencing an apparent change of heart, they are not motivated by a perceived threat to their job security, a concern that their failure to sign would be communicated to their employer and might result in reprisals, or other activity which casts doubt on the voluntariness of the employee expression.

11. It must be clear that the circulation of a petition purporting to indicate an employee change of heart is free from the actual, or perceived influence of management. Often, as in the present case, a petition will be signed by employees who have indicated their support for the trade union only a short time before; and a natural question arises as to what made the employee change his mind. Moreover, while an employee can be reasonably assured that his support for the union will not be communicated to his employer, he may have no such assurance concerning his refusal to sign a petition opposing the union and frequently, such petitions are openly circulated on the employer's premises during working hours by employees who, in their opposition to the union, will be objectively aligned in interest with their employer. In these circumstances, an employee may sign a petition because he fears that a refusal to do so will expose his support for the union and will be made known to his employer. Similarly, an employee may be motivated to sign a petition because of employer conduct suggesting that his continued support for the union will result in loss of his job or other adverse employment consequences. In neither case can one regard his signing the petition as truly voluntary for, in both cases, it results from a perceived threat to his job security.

12. It is for this reason that the Board undertakes the enquiry into the origination and circulation of the petition contemplated by Rule 73, in order to satisfy itself that the statement in opposition to the trade union really represents a voluntary change of heart. The Board is sensitive to the responsive nature of the employer-employee relationship, and the degree to which an employer's control over the employee's economic security can influence him. In *Pigott Motors* 63 CLLC ¶16,264, the Board put it this way:

"In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories."

Ultimately, of course, the Board must draw inferences and make findings on the basis of the evidence before it; but the evidence in this case and the way in which the truth was finally revealed, amply illustrates the need for the kind of careful appraisal of the situation suggested by the Board in *Pigott Motors*, *supra*.

13. In accordance with its usual practice and pursuant to Rule 73 of the Rules of Practice, the Board entertained evidence concerning the origination, preparation and circulation of the petition documents. Raymond Taggart testified about the two petition documents with which he was involved. That testimony was a litany of lies — as he eventually admitted on cross-examination.

14. Taggart testified that the idea of a petition opposing the union originated with a discussion which he had with P5 on the morning of November 24, 1981. (Because of section 111 of the Act, the Board will attempt, insofar as possible, to preserve the anonymity of persons who have indicated their union support or opposition.) According to Taggart, the wording was entirely his own. The petition document was typed by his sister at her home in Barrie. After the petition was circulated, Taggart visited his sister again so she could type the Board's address on the envelope in which the petition was delivered to the Board. The petition was delivered to the Board by Taggart himself on November 26th. Taggart told the Board that he was able to get time off to do so because he called in sick to Art Owendyk, his foreman. He said he never went to the plant at all on November 26th.

15. The second petition document is a photocopy of the first, and bears one signature. This signature was obtained on November 27th. According to Taggart, he mailed the second petition to the Board by registered mail after work on November 27th. When asked why the handwriting on the envelope containing this petition was substantially different from his own, Taggart initially said that he had difficulty "printing straight" and had had to have his sister address the envelope before he could go to the post office to have the document mailed. Yet,

Taggart had no difficulty writing his return address legibly on the back of the envelope containing the first petition delivered by him to the Board on November 26th; nor did he have any similar difficulty on the note attached to the second petition sent by registered mail.

16. When queried about how the photocopies were made, Taggart testified that he had entered the respondent's office area early on the morning of the 25th, when no one else was around, and made several xerox copies. He maintained that at no time had he had any discussions with management about the petition except in respect of Barry Collart, who was the last person to sign and who Art Owendyk said was interested in doing so. Taggart first testified that Owendyk was involved in soliciting Collart's signature, then said that Owendyk had only indicated Collart's interest and the petition had been left in the stockroom for Collart to sign. Apart from this, however, all of Taggart's other initial assertions (i.e., about the origin and preparation of the petition) were made clearly, unequivocally, and, for the most part, repeatedly, both to the Board, and to counsel for the union in the initial stages of his cross-examination.

17. But on further cross-examination, Taggart's evidence began to unravel. The typeface on the various documents was different. They were not typed by the same typewriter, and Taggart eventually admitted that his sister had nothing whatsoever to do with it. The petitions were typed in the respondent's offices by persons unknown. The handwriting, which differed so markedly from Taggart's, was that of a secretary in the office. Taggart still maintained, however, that he was unaware of the involvement of any *particular* managerial personnel in the preparation of the petition. He explained that on the morning of November 24, 1981 he left a note in the office (no one else was then present) saying that he needed a petition against the union and that several hours later the petition documents, with photocopies, mysteriously appeared in the place where he had left the note. Thus, he said, he had no idea who prepared the document, who typed it, or who xeroxed it. He checked back with the office every forty-five minutes or so until the document appeared. He continued to deny any conversations with management about the petition or that he had been coached on how it should be circulated.

18. Taggart's evidence concerning the circulation of the petition was equally unsatisfactory. At one point he maintained that none of the signatures had been solicited on company time, at another he said that he had no recollection of when the signatures were obtained, at another he testified that they had been obtained over two days. He continued to assert that all of the employees had been approached on their own time (a factor that has been mentioned in the Board's cases) but, when pressed, he was unable to give any explanation why it mattered one way or the other whether employees had signed during working time. Despite his earlier denial, he admitted that he had in fact come to work on the morning of November 26th. He had never phoned in sick to Art Owendyk, yet he had no satisfactory explanation for this rather unusual early morning visit to the plant or how he could be away for a day without permission. All of these admissions, of course, represent direct contradictions of statements he had earlier made.

19. Eventually, Taggart also repudiated that part of his testimony concerning the note left in the office. He admitted that he had talked to Art Owendyk on a number of occasions on November 24th and November 25th. It was Owendyk who arranged to have the petition documents prepared, typed, and photocopied. It was through Owendyk that the petition process was initiated. It was through Owendyk that Collart, at least, was induced to sign. It

was Owendyk to whom he gave the envelope with the second petition so that it could be typed. And it was Owendyk who returned it a little later handwritten. Given Taggart's belated admissions and transparent attempt to deny any managerial involvement whatsoever, it is difficult to resist the conclusion that Owendyk was intimately involved with the petition from start to finish.

20. The Board can only speculate as to why Taggart would embark on this course of distortion, fabrication and falsehood. According to the union witnesses, he had earlier indicated his support for the union, and before us, did not exhibit any anti-union animus.

21. A further indication of Owendyk's role arises from the evidence of Barry Collart. We accept the evidence of Collart in its entirety. Owendyk did not give evidence.

22. Collart told the Board that he was first approached by Owendyk early on the morning of November 24th and told that it would be necessary to start up a petition to convince the Board that employees were opposed to the union, and to stop it from "getting in". Owendyk asked Collart if he would be willing to sign the petition, but at that time Collart said that he did not wish to be involved. Later that day, or on the following day, Owendyk approached Collart once again and asked whether his support for the petition could be counted on. Owendyk advised that as a shear operator, Collart's position could be regarded in one of two ways: he could be considered important to the company, or he could be considered one of the employees to be laid off if things got rough. Subsequently, Collart was approached once again and told that Taggart would be around with his petition. This time, Collart indicated he was reluctant to have his support for the petition known by the other employees. Owendyk indicated that it would be arranged that Collart would sign last — as indeed he did. The only way this could be accomplished, of course, is if Owendyk were monitoring the progress of the petition. We find that he was.

23. Having regard to the total lack of credible evidence concerning the origination, preparation and, in particular, the circulation of the Taggart petitions, and in view of the direct and uncontradicted evidence not only that Owendyk was involved but also that Collart's support was induced by a veiled threat of a layoff, we are not prepared to give any weight whatsoever to the Taggart petitions. We further find that a subsequent document submitted by Collart indicating that he had only signed the petition under pressure and reaffirming his support for the union is voluntary, and indicates his true wishes.

24. Michael C. Bullen gave evidence concerning the other petition document, which contained his signature together with that of another employee (P12). Having regard to Bullen's demeanour, his responsiveness to questions, the clarity, consistency and plausibility of his answers on cross-examination, and the evasive or equivocal quality of some of those answers, we find that Bullen was not a credible witness. We note further that unlike the union's witnesses, Bullen was present throughout the proceedings and had heard the examination and cross-examination of Raymond Taggart. It was evident what the Board's concerns were, and during the proceeding, Bullen made notes of the evidence which he proposed to give. He sought, in direct examination, to read from those notes. The request was denied. Not surprisingly, however, his evidence was not rife with contradictions as was that of Taggart.

25. Bullen attended a union meeting on Sunday, November 15th but after that meeting he was undecided. He signed a union card the following day. He told the Board that at that

time he thought the union was a good idea. He did not change his mind until some days later. His petition was signed and mailed to the Board by registered mail on November 27, 1981 — the terminal date. What changed his mind?

26. Bullen testified that he had the change of heart because of the Irwin Toy strike, and because in 1977 when he was working in the dockyards in England the company had folded and it was his view that a union had contributed to that failure. But both of these events occurred well before he signed a membership card and (except for the plant closure aspect of the matter — see below) there was no particular reason why they should suddenly have any greater significance in the days following November 16th. But something did happen after November 16th, as Bullen, after some equivocation eventually admitted. He received a wage increase and was promoted to lead hand. Curiously, Art Owendyk, the foreman, was “demoted” to lead hand at the same time although, it appears, there was no change in his duties and responsibilities. It is also evident that by this time the respondent was well aware of the union’s organizing campaign, and it is difficult to resist the conclusion that the events are connected. Tom Brickley, a managerial official responsible for personnel relations at the respondent’s parent company in the United States, arrived on the scene November 17th and remained until November 19th.

27. Bullen was unable to give any plausible reason why he did not sign the Taggart petition which had been circulated only a couple of days before. Bullen simply said he was in “no rush” and, like Taggart, he was careful to maintain that his document was not signed on company time. When asked why this should be a concern, he first said, then repeated that it was on the Form 6, Notice to Employees. When shown Form 6 (which does not mention this matter) he suggested that it was just common sense. Bullen maintained that he had not been coached by management, or had any conversation with managerial personnel about the petition, although he did admit that Art Owendyk or Fred Thompson, the respondent’s production superintendent, had given him time off during the morning *and* the afternoon of November 27th, and it was during that time off that certain calls were made about the petition, it was drafted, and Bullen visited the post office so it could be sent by registered mail as required by the Rules of Practice. Finally, Bullen was unable to give any evidence concerning the circumstances under which P12 signed the document. Bullen said P12 was given the document, took it away, and returned it one-half hour later signed. There is no indication that P12’s signature is a forgery, however, there is also no evidence concerning when or where P12 signed, who may have been present, who he talked to, and the extent, if at all, he may have been influenced by Bullen’s sudden promotion to “lead hand”. And Taggart earlier testified that he had approached everybody to solicit support for his petition. What made P12 change his mind?

28. Each of these matters, standing by itself, may not be significant, but when viewed cumulatively, and in light of our general assessment of Bullen’s credibility, we are satisfied that we should not regard Bullen as a reliable witness and should not give any weight to his statement of desire — especially as it relates to P12.

III

29. Fesiuk’s evidence concerning the alleged intimidation by union organizers was rebutted in all material particulars by Milton Peacock, and Wayne Tutt, the individuals allegedly involved. We accept Peacock’s and Tutt’s evidence wherever it is in conflict with that of Fesiuk.

30. Fesiuk signed a union membership card on the morning of November 16th, in Milton Peacock's truck, just before the two employees went to work. We find that there were no threatening or intimidatory statements made. Peacock did tell Fesiuk that the majority of employees supported the trade union and that he expected seventy per cent or more to sign membership cards. Peacock encouraged Fesiuk to sign too. His suggestion to "jump on the band wagon" is not intimidation or coercion, nor was the statement even a misrepresentation. It was Peacock expressing his view concerning the likely success of the union's organizing campaign, and as it turned out, he was substantially correct. Peacock knew that in the weeks prior to the organizing campaign a substantial number of employees had expressed pro-union sentiments and a number had signed cards at the first and only organizing meeting held the night before. All of the rest were collected on November 16th, so that, in the space of twenty-four hours, the union garnered the support of sixty-seven per cent of the respondent's employees — just one short of what Peacock predicted. It was suggested by counsel that Fesiuk might feel "lonely" or in the minority in face of Peacock's statements. Even if that is true (and, interestingly Fesiuk did not put it this way), we do not think that amounts to intimidation or coercion. Moreover, we note that Fesiuk himself testified that he had a good relationship with Peacock in the days following the signing of the card, which only soured when Peacock learned he was being charged with intimidation.

31. There is no merit whatsoever to the fuzzy allegations concerning the conversation which Fesiuk said he overheard, nor do we accept that any intimidatory statement was made by Wayne Tutt.

32. Of rather more interest is Fesiuk's evidence concerning his conversation with Steve Hamilton, the respondent's general manager. That conversation occurred after Hamilton summoned him to the office, asked what he knew about the union's organizing campaign, and invited him to inform about the activities of his fellow employees. Initially, Fesiuk denied that he had told Hamilton about signing a membership card or about who was organizing for the union. Subsequently, however, he admitted that he advised Hamilton of both, and informed him of the employees whom he (Fesiuk) thought would be "for or against". It was during this conversation, which lasted forty-five minutes, that Fesiuk reached the conclusion that he should have waited before signing a card, and he finally admitted that he hadn't signed a card because of any concern about intimidation. Rather, he had second thoughts after his conversation with Hamilton.

33. Fesiuk also told the Board that he had outlined the circumstances of his signing a card to Fred Thompson, the production manager. This occurred on or about December 1, 1981, some three days before the initial hearing in this matter, but well after all of those matters had been fully particularized in the respondent's reply, which is dated November 27, 1981. Shortly thereafter (i.e., on or about December 3rd), Fesiuk was advised that he was being transferred to a job in the office. Fesiuk is a mechanic who has worked at various blue-collar jobs in the plant. He said he has had no previous office experience or interest in office work, nor had he suggested any such transfer.

34. Fesiuk was not the only employee approached by a senior member of management to discuss the union. On Tuesday, November 17th, Fred Thompson asked Barry Collart casually about his feeling towards the union, and when Collart indicated that he was opposed (which in fact he was not), Thompson responded that they should meet privately in Steve Hamilton's office. At that meeting, Collart was asked who was responsible for the organizing

campaign, and how the campaign was going. Hamilton said that a union was not a good idea for a shop of the respondent's size, and that since the U.S. parent had a policy against third party involvement in its affairs, it would be displeased about the possibility of its subsidiary being unionized. Hamilton said that in England, the firm had faced the same type of problem and had avoided it by shutting down the plant (a statement which, it is interesting to note, is not unlike that made by Bullen). It would be easy, said Thompson, to simply turn the respondent's facility into a warehouse. Collart was told that someone from the head office would be arriving shortly who knew how to handle the situation and had taken care of the union problem in England. Brickley arrived the next day. During the week, Thompson approached Collart on several other occasions to ask what was going on, and he repeated his earlier suggestion that if the trade union were successful the company would simply shut down.

35. The evidence concerning Thompson and Hamilton's conversation with Collart is not contradicted. Neither Thompson nor Hamilton gave evidence.

IV

36. We have set out the testimony and evidence (including the many contradictions, falsehoods, and fabrications) at some length because it so amply illustrates the concern expressed in *Pigott Motors*, and the need for a careful approach in dealing with petitions. Taggart's petition was put forward as a voluntary statement in which the employer was wholly uninvolved. Yet it turned out that it was initiated and prepared by a member of management who, in one instance at least, suggested that an employee who did not sign it might be laid off. At the same time, senior members of management were approaching employees about the union, asking them to reveal which of their fellow employees were union supporters, and suggesting that the union's success would be met with a closure of the plant. And the petition itself is an open invitation to declare one's opposition to the union — opposition in which the employer is obviously interested and here solicited. It is hardly surprising that employees who are actually in favour of the union might feel some reluctance to reveal that fact by refusing to sign a petition — just as Collart initially responded to Thompson that he was not among the union supporters. It is for precisely this reason that Rule 73 envisages an enquiry into the origins and circulation of the petition so the Board can be sure that such influences are absent.

37. In all of the circumstances, we are not prepared to give any weight whatsoever to the statements purportedly indicating opposition to the union, nor are we prepared to give weight to, or accept, Fesiuk's charges concerning the manner in which his membership card was solicited.

38. On the basis of all the evidence before it, the Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on November 27, 1981, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

39. A certificate will issue to the applicant.

1622-81-U Ontario Nurses' Association, Complainant, v. Edward Street Manor Nursing Home, Respondent.

Interference in Trade Unions – Practice and Procedure – Unfair Labour Practice – Earlier complaint settled by parties – Whether settlement breached – Whether union can raise employer conduct prior to filing of first complaint not particularized therein – Whether employer discriminating against union supporters in lay-off

BEFORE: R. D. Howe, Vice-Chairman, and Board Members C. G. Bourne and M. J. Fenwick.

APPEARANCES: *Shalom Schachter, Sherrie Seeley, Maureen O'Halloran and Marion Perrin for the complainant; K. W. Kort, P. Bogue, S. McKinnon and B. Sager for the respondent.*

DECISION OF THE BOARD; February 24, 1982

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant alleges that the respondent has contravened sections 3, 64, 66, 67, 70, 72 and 79 of the Act. The complaint arises out of the lay-off by the respondent of certain registered nurses, and the assigning of a registered nursing assistant ("R.N.A.") to work on a shift to which a registered nurse ("R.N.") has traditionally been assigned.

2. On or about May 29, 1981, the complainant Association filed an earlier complaint under what is now section 89 of the Act (File No. 0458-81-U). In that complaint, the Association alleged that it had been dealt with by the respondent contrary to the provisions of what are now sections 3, 64, 66, 67, 70 and 79 of the Act, and alleged (in Appendix "B" to its complaint) the following particulars in support of its complaint:

- "(1) On or about May 13th, 1981, the Complainant applied for certification of a bargaining unit consisting of registered nurses employed by the Respondent.
- (2) On or about May 20th, 1981, at approximately 2:30 P.M., the Director of Nursing, Joan Davis, telephoned Pegg Dougherty, a registered nurse employed by the Respondent, at her home, and stated that the owner, Mr. P. Bogue, would meet an earlier request for an increase in wages dated February 23rd, 1981 if the nurses would sign a letter that they did not wish to be represented by the complainant. She also stated that the Respondent was calling a meeting of all staff for 1:30 P.M., on May 21st, 1981.
- (3) On or about May 20th, 1981, at approximately 2:40 P.M., the owner, Mr. P. Bogue, took Sherry Celia, a registered nurse employed by the Respondent, into his office and asked her to speak to the other nurses about requesting a new vote in regard to the complainant. He further indicated that he would meet their requests for a wage increase of February 23rd, 1981, that things would get much worse if they continued with the union, and that he wanted

her to become a spokesperson for the nurses if they withdrew their application for certification.

- (4) On or about May 20th, 1981, at approximately 5:30 P.M., the owner, Mr. P. Bogue, telephoned Nancy Dryden, a registered nurse employed by the Respondent, at her home, and told her to come to a meeting on May 21st, 1981, at 1:30 P.M. where he was prepared to put forward a counter offer to their request for a wage of [sic] increase of February 23rd, 1981. He further advised her that he knew she had been talking to the nurses and indicated that he knew from experience that the union would not work. He also stated that he knew he should not be talking to her but that he wanted to give the nurses these things to make them happy and then they would veto the Complainant.
- (5) On or about May 20th, 1981, the Director of Nursing, Joan Davis, telephoned Bev Lowther, a registered nurse employed by the Respondent, and indicated that the owner would meet the demands for wage increases contained in their letter of February 23rd, 1981, and advised her that there was a staff meeting on May 21st at 1:30 P.M.
- (6) On or about May 20th, 1981, the owner, Mr. P. Bogue, took Norma Bush, a registered nurse employed by the Respondent, into his office, and indicated that he would meet the demands contained in the letter of February 23rd, 1981. He further stated that he wanted an immediate answer as to whether she would accept his proposal and that if she did, it would mean getting rid of the application for certification.
- (7) On or about May 20th, 1981, the owner, Mr. P. Bogue, telephoned Julie McCullen, a registered nurse employed by the Respondent, at her home and advised her that although it was O.K. with him if the nurses joined the Complainant, nothing would be settled for a year and a half to two years and it would be better for her to accept the terms contained in the letter of February 23rd, 1981. He further advised her that he was calling a meeting at 1:30 P.M. on May 21st, 1981.
- (8) On or about May 20th, 1981, the owner, Mr. P. Bogue, told Sherry Celia, a registered nurse employed by the Respondent, at work, that the staff meeting had been cancelled on the advice of his lawyer and asked her to inform the other nurses.
- (9) *On or about May 25th, 1981, at approximately 11:00 A.M., the owner, Mr. P. Bogue, spoke to Bev Lowther, a registered nurse employed by the Respondent, at work, and indicated that he only needed two registered nurses to maintain the nursing home and that the two that would remain were the ones who had not signed cards.*

He further indicated that he did not need a head nurse in the nursing home and that it would take a minimum of one year for the union to settle anything. The head nurse at the time of this conversation was Norma Bush.

- (10) On or about May 28th, 1981, the owner, Mr. P. Bogue, told Norma Bush, a registered nurse employed by the Respondent, at work, that the nurses would no longer have a desk in the nursing station. He further indicated to her that she was not the head nurse anymore and that the union would not permit her to be a head nurse.
- (11) On or about May 28th, 1981, the Director of Nursing, Joan Davis, indicated to Bev Lowther, a registered nurse employed by the Respondent, that the owner was still open to negotiations until June 5th, 1981, the date of the hearing of the application for certification. She further indicated that the owner wanted to know their bottom line and whether any of the nurses were having second thoughts."

(emphasis added)

- 3. That complaint was withdrawn by the Association in accordance with the following Minutes of Settlement dated June 22, 1981:

"The parties agree to settle [Board File No. 0458-81-U] on the following basis:

- 1. The Employer acknowledges that it has violated the Ontario Labour Relations Act.
- 2. The Employer agrees that it will bargain exclusively with the Ontario Nurses' Association in the latter's capacity as the sole collective bargaining agent for registered nurses.
- 3. The Employer agrees that it shall not alter the wages, terms or conditions of employment, rights, privileges or duties of any of its nurses and without restricting the generality of the foregoing, those of Ms. Norma Bush, without the consent of the Ontario Nurses Association. The Employer further agrees that Ms. Norma Bush will be reinstated to her former status as Head Nurse.
- 4. The Association agrees to request leave of the Ontario Labour Relations Board to withdraw its Complaint under Section 79 dated May 29, 1981 and appearing on Board File #0458-81-U."

- 4. The complaint filed by the Association in the present case states that the "Complainant repeats each and every allegation against the Respondent contained in Ontario Labour Relations Board File No. 0458-81-U as an allegation of misconduct in this application which it intends to rely upon and in particular without limiting the foregoing that the owner, Mr. Bogue, on or about May 25, 1981 at approximately 11:00 a.m. spoke to Bev Lowther,

registered nurse employed by the Respondent, indicating that he only needed two registered nurses to maintain the nursing home and that the two that would remain were the ones who had not signed cards." The present complaint also includes allegations with respect to further events that are alleged to have occurred prior to May 29, 1981 (the date of the first section 89 complaint).

5. In his preliminary submissions to the Board, counsel for the respondent (who had no involvement in the earlier complaint) contended that the Board should not permit the complainant to adduce evidence in support of the allegations concerning further events that are alleged to have occurred prior to May 29, 1981 since the complainant failed to promptly bring those allegations to the attention of the Board. He acknowledged that the respondent "starts the day with one strike against it" since the respondent has admitted that it previously breached the *Labour Relations Act*. However, he submitted that the complainant ought not to be able to relitigate matters that were properly the subject matter of the previous complaint. Counsel also suggested that there was no purpose in proceeding with the complaint in view of the fact that the registered nurses who had been laid off by the respondent were not in attendance at the hearing.

6. Counsel for the complainant argued that the particulars of further events which allegedly prior to the first section 89 complaint were properly included in the present complaint because their "relevance was not apparent in the prior case". He also noted that the Minutes of Settlement did not contain any limitation on the future use of the allegations contained in that complaint. He contended that the complainant was entitled to proceed in the absence of the registered nurses in question, since their lay-off was not only a wrong to them, but was "also a wrong done to the union" and to the other members of the bargaining unit.

7. After recessing to consider the submissions of the parties, the Board made the following oral ruling which is hereby confirmed:

"In the absence of evidence to the contrary, we are prepared to infer that the acknowledgement by the employer that it violated the Act, as set forth in paragraph 1 of the Minutes of Settlement dated June 22, 1981, is a blanket acknowledgement of all of the allegations contained in Appendix "B" to the previous complaint (File No. 0458-81-U). If the respondent seeks to rebut that inference by adducing evidence to the contrary, then we will permit the complainant to adduce evidence in support of all of the matters dealt with in the previous complaint which the respondent disputes.

In so far as the present complaint contains allegations of improper conduct alleged to have occurred prior to May 29, 1981 (the date of the previous complaint) which were not particularized in that previous complaint, the complainant has failed to comply with Rule 47 [now section 72 of the Board's Rules of Procedure] and, having regard to all of the circumstances, the Board will not permit the complainant to adduce evidence with respect to those allegations (namely, paragraphs 3 and 4 of the present complaint). Thus, we will only permit the complainant to adduce evidence with respect to the matters which are alleged to have occurred after May 29, 1981. Under section 89(7) of the Act, an alleged

breach of a written settlement of a previous section 89 complaint 'shall be deemed to be a complaint under section 89(1)'. Accordingly, it is open to the complainant to attempt to establish that the actions which the respondent is alleged to have taken subsequent to the settlement constituted a breach of that settlement. This does not, however, entitle the complainant to adduce evidence concerning events that preceded the settlement.

The absence of the grievors does not preclude the complainant from proceeding with its complaint, which alleges a number of violations of the Act which, if they in fact occurred, could have an adverse effect upon the union's bargaining rights.

Having regard to the agreement of the parties, the Board will call upon the complainant to proceed first with its evidence but will, of course, apply the reverse burden of proof under section 89(5) to each of the allegations to which it is applicable as a matter of law."

8. The respondent operates a nursing home in Sterling, Ontario, which is located in the County of Hastings approximately fourteen miles north of Belleville. Approximately 63 persons are employed at the Home, which has about 75 residents in its care. Prior to December of 1980, the respondent generally employed an R.N.A. on its night shift. However, from December 1, 1980 to June 30, 1981, the respondent had no one on its staff employed as an R.N. A. because the R.N.A. employed by the Home prior to December of 1980 went on maternity leave and, in the words of Shirley McKinnon, who has been the Administrator of the Home for twelve years, "there were plenty of R.N.'s available". It was Ms. McKinnon's evidence that she decides whether to hire R.N.'s or R.N.A.'s "according to the need and the supply and demand". When R.N. Julie Anne McMullen left the employ of the respondent in the spring of 1981 to work at the Belleville General Hospital, Ms. McKinnon called the Hospital "to see if they knew of any R.N.'s that were available" and also called Canada Manpower, but was unable to discover any candidates. The respondent then hired R.N.A. Sharon Saulnier on July 1, 1981. It was Ms. McKinnon's evidence that one of the reasons the Home hired R.N.A.'s subsequent to June of 1981 was the shortage of available R.N.'s. Her evidence concerning the shortage of R.N.'s was neither contradicted nor disputed by the complainant (although counsel for the complainant did suggest that the unavailability of R.N.'s might be due to the wage rate paid to R.N.'s by the Home, which wage rate Ms. McKinnon conceded to be lower than the wage rate paid to R.N.'s employed by Belleville General Hospital).

9. Joan Davis, who was the respondent's Director of Nursing from the fall of 1977 to July of 1981, was subpoenaed by the complainant as a reply witness. We found her to be a candid and credible witness whose evidence we accept without reservation. She commenced employment with the Home in November of 1974 as a part-time staff nurse whose hours gradually increased over the years. After obtaining her nursing degree from McMaster University in 1959, she gained a variety of experience through employment with the V.O.N., a Bermuda hospital where she worked in the emergency department, the Hamilton Civic Hospital School of Nursing where she was an instructor, and McMaster University where she was the Director of the Nurse Practitioner Program. She is currently a Teaching Master at Loyola College in the nursing diploma course. Ms. Davis testified that during 1979 she

discussed the employment of R.N.A.'s in the Home with Ms. McKinnon and they agreed that because of the care required by the residents and the need for assessment skills possessed only by R.N.'s, they "preferred" to employ R.N.'s rather than R.N.A.'s at the Home. It was Ms. Davis' evidence that this preference was communicated to the nursing staff "in a general way". Accordingly, although the respondent continued to employ the one R.N.A. whom it had on staff at that time, no other R.N.A. was hired during Ms. Davis' tenure as Director of Nursing, nor did the Home advertise any R.N.A. positions or interview any R.N.A.'s as it had done in the past.

10. Maria Pollard was appointed to be the respondent's Director of Nursing effective July 25, 1981. Prior to assuming that position she had been in charge of a medical surgical floor in a hospital and had also worked for five years in a self-care unit. In total, Ms. Pollard has twelve years' experience as a registered nurse. Ms. Pollard testified that she began to study the respondent's nursing requirements as soon as she became the Director of Nursing. At the time of her appointment, the respondent's head nurse was scheduled to work from 7:30 a.m. to 3:00 p.m. each week day and another R.N. was scheduled to work from 7:00 to 11:00 a.m. each week day, while two R.N.'s were scheduled to work on the 7:00 a.m. to 3:00 p.m. shift on Saturdays and Sundays. Unlike her predecessor, who had personally regularly performed certain nursing functions in the Home by giving some residents medication during the lunch hour, Ms. Pollard did not regularly perform any non-supervisory nursing functions. Thus, the R.N.'s work load at the Home increased somewhat as a result of Ms. Pollard's appointment as Director of Nursing.

11. In the late summer or early fall of 1981, Ms. Pollard decided to recommend to Ms. McKinnon that the R.N. on the 7:00 a.m. to 11:00 a.m. shift be replaced by an R.N.A. Ms. Pollard told the Board that the Home had an "R.N.A. working midnights" whom she "felt . . . was competent to do the 7:00 — 11:00 a.m. shift". Ms. Pollard also testified that the nursing load at the home had decreased between September and October of 1981 as a result of the death or transfer to hospital of three or four residents who required heavy care such as injections and catheter irrigations which could only be performed by an R.N. It was her evidence that although those residents were replaced by other residents "within a day or two", the new residents did not require as much care. She also testified that in August of 1981 the physician who regularly attends at the Home "reduced the number of times that the bladder irrigations had to be done" by changing the irrigation order from "once daily" to "when required". She advised the Board that this change also reduced the nursing load somewhat since not all of them required daily irrigation.

12. In mid-September, Ms. Pollard prepared and posted a draft R.N.A. routine for the 7:00 — 11:00 a.m. shift, which had previously been staffed by an R.N. During the first week of October, Ms. Pollard called a meeting of the nursing staff to discuss a number of matters, including the registered nurses' concern about their work load and their opposition to the proposed 7:00 — 11:00 a.m. R.N.A. shift. As a result of a suggestion that had the approval of a majority of the ten R.N.'s who attended that meeting, Ms. Pollard decided that the vitamin B12 intramuscular injections that had traditionally been administered by R.N.'s during the week would thereafter be given on weekends since there were two registered nurses on the 7:00 a.m. — 3:00 p.m. shift on the weekends (while there was only one R.N. on that shift on weekdays). Following that meeting, Ms. Pollard prepared and posted a revised R.N.A. routine for the 7:00 — 11:00 a.m. shift. She testified in chief that no one complained about the revised routine. However, in cross-examination she conceded that after she revised it, "there

were remarks made”, “there was bickering”, “but as a group [the nursing staff] never came back in and said we can work something out”. Ms. Pollard also discussed the proposed staffing change with Ms. McKinnon, who agreed with it and, accordingly, worked it into the schedule. After receiving approval for the proposed change, Ms. Pollard arranged to have an R.N.A. trained on the 7:00 — 11:00 a.m. shift by an R.N.

13. Ms. Pollard expressed the view that the transfer of the vitamin B12 injections to the weekend R.N.’s did not result in any overload of those nurses; however, she later conceded that she had never worked on a weekend and that the basis of her view was that the weekend R.N.’s “never came to [her] and said there wasn’t time to do it”. She further conceded in cross-examination that it was “possible” that the nurses only suggested the reassignment of responsibility for those injections because she indicated to them that the substitution of an R.N.A. for the R.N. on the 7:00 — 11:00 a.m. shift “was made irrevocably”.

14. Barbara Sager, who has been an R.N. for thirteen years, was appointed to replace Ms. Pollard as Director of Nursing on November 16, 1981. She commenced employment with the respondent in September of 1977 as an aide and “started as an R.N. in January of 1978”. She was subpoenaed by the respondent to testify at the hearing with respect to the complainant’s application for certification as bargaining agent for the registered nurses employed by the respondent (Board File No. 0341-81-R). At that hearing on Friday, June 5, 1981, she gave evidence before the Board (differently constituted) concerning “the way the union conducted itself during the organizing campaign”. Since Ms. Sager found the certification proceedings to be “very upsetting”, her husband telephoned the Home on the following Monday to say that she would not be reporting for work because she was very upset and was “quitting immediately”. Later that day, Mr. Bogue, the owner of the respondent, telephoned Ms. Sager’s husband and told him that Ms. Sager could have a leave of absence “until she got her head on straight”. Ms. Sager subsequently told Joan Davis (who was then the Director of Nursing) that she felt that she should resign because she “did not feel that she could work with the girls”. However, when Ms. Davis met with Mr. Bogue later that week, he asked her if she would be agreeable to “saying that Ms. Sager was granted a leave of absence”. Ms. Davis agreed to Mr. Bogue’s suggestion of “calling it a leave of absence as opposed to quitting”. When Beverley Lowther, one of Ms. Sager’s fellow nurses, telephoned Ms. Sager on Wednesday or Thursday of that week to say that she was sorry that Ms. Sager felt that she had to resign, Ms. Sager confirmed that she had “quit”. Since Mr. Bogue refused to accept Ms. Sager’s resignation, she was placed (retroactively) on a two week leave of absence, following which she returned to work with no loss of “seniority”.

15. Ms. Sager had been away from the Home on maternity leave from September of 1979 to January of 1980. Although the complainant alleged that she was employed as a part-time employee prior to her maternity leave, having regard to all of the evidence the Board finds that she was employed as a full-time employee at that time. When she returned to work in January 1980, she “came back part-time because [she] knew that if [she] came back on the same basis as [she] had been before the maternity leave, one of the girls would lose some or all of her hours.” However, she did not intend that arrangement to be “permanent” as she “wanted to eventually get [her] full-time hours back”. She told the Board, “I waited until my baby was two years’ old. It was then feasible for me to step back to full time hours”. She also told the Board that she requested reinstatement to a schedule because she “needed the money”. Ms. Sager’s request to return to a full-time schedule is contained in the following letter dated September 29, 1981 of Ms. McKinnon:

"This letter is to request that you re-instate me to my previous position as full time staff nurse.

In 1979, as discussed with you, prior to my Maternity Leave, I requested part time only until this time this year, October 1981.

Thanking you for your immediate attention in this matter, I remain,

Yours truly,

Barbara E. Sager Reg. N.

c. c. Mr. P. Bogue.
File"

Although that letter indicates that prior to her maternity leave, Ms. Sager discussed with Ms. McKinnon that she wanted to work part-time only until October of 1981, it was Ms. McKinnon's evidence that the request for part-time work was made by Ms. Sager "just prior to returning" from maternity leave. Ms. McKinnon also testified that although it "wasn't a permanent arrangement in [her] mind", it "wasn't specified how long it would be". Ms. Sager's request was granted by Ms. McKinnon who told the Board that when Ms. Sager "requested full-time it was necessary to give it to her [because] she was entitled to it."

16. By letter dated October 14, 1981 Ms. McKinnon advised R.N.'s Ruth Ruttan and Joan Farquhar that they were laid off immediately "as a result of the lack of work" but would be recalled "if the availability of work arises in the future". Ms. McKinnon testified that she selected those employees to be laid off on the basis of seniority. Although Ms. Ruttan had the same seniority date (November 10, 1980) as another R.N. (P. Dougherty), Ms. McKinnon testified that she laid off Ms. Ruttan rather than Ms. Dougherty because the latter had worked for the respondent "almost a year before in 1979". Ms. McKinnon also testified that laying-off only Ms. Farquhar (who had the least seniority of any of the R.N.'s employed by the respondent) would not have given Ms. Sager a full-time schedule because Ms. Farquhar only worked two shifts every two weeks. (Ms. Farquhar had requested this reduced schedule, which involved working only every other weekend, due to family commitments).

17. At the time of her decision to lay-off Ms. Ruttan, Ms. McKinnon was aware that Ms. Ruttan was a member of the complainant. However, she was also aware that Ms. Farquhar was one of the two R.N.'s employed by the Home who had not joined the complainant (the other being Ms. Sager) since that "was common knowledge throughout the Home". Moreover, she was aware that Ms. Dougherty, who was retained instead of Ms. Ruttan despite their common seniority date, was also a member of the complainant.

18. The respondent's position concerning the matter in issue is set forth in the following passage contained in a letter dated October 15, 1981 from counsel for the respondent to Maureen O'Halloran, an Employment Relations Officer employed by the complainant to service a number of bargaining units, including the bargaining unit at the Home operated by the respondent:

“

At this time I would also advise you of several matters which have occurred since our last negotiating meeting.

As you may be aware Mrs. B. Sager returned from a maternity leave. Prior to that leave she was working as a full time registered nurse (4 shifts per week) and prior to commencement of the maternity leave she requested part time work for a short period after she came back to work. She has since requested that she be re-instated to her full time position (copy of application enclosed). At the same time I am advised that the amount of registered nursing care hours required for the Nursing Home has been significantly reduced in the last month. This is attributable to a reduction in the number of residents who require nursing care which can only be administered by a registered nurse. As a result a registered nurse is no longer required for the 7:00 a.m. to 11:00 a.m. shift and will not be assigned to that shift. This change in work load will result in a reduction of twenty nursing hours per week.

Since Mrs. Sager has requested a return to full time she is now entitled to four shifts per week and commencing the next shift schedule this will be assigned to her.

In the result two registered nurses will be laid-off, effective immediately, and such lay-off will be effected by seniority. J. Farquhar and R. Ruttan, the most junior nurses, will be laid-off. You will note that P. Dougherty and R. Ruttan have the same seniority date, however since the former mentioned nurse had worked previously at the Nursing Home it was decided that she would remain and Ms. Ruttan would be laid-off. I emphasize that this is a lay-off only and in the event that the nursing work load increases they will be re-called in reverse order of their seniority. I trust the above is satisfactory and of course should you wish to discuss this matter I would be pleased to do so.

. . . .”

Ms. O'Halloran made no response to that letter nor did she attempt to contact counsel for the respondent to discuss the matter. However, she did take steps to “check this out with the nurses employed at the Edward Street Manor Nursing Home” and arranged for the present complaint to be filed on October 27, 1981.

19. Section 89(5) of the Act provides:

“On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.”

Certain of the violations of the Act that are alleged in this complaint cast upon the respondent the burden of proving (on the balance of probabilities) that it did not act contrary to the Act, namely, the alleged contraventions of sections 66 and 70, (see *Starplex Scientific Division of Canadian Medical Laboratories*, [1981] OLRB Rep. March 346 at paragraph 33). Accordingly, the Board will apply the "reverse onus" to those allegations to which it applied as a matter of law.

20. In the *Barrie Examiner* case, [1975] OLRB Rep. Oct. 745, the Board wrote:

"... the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts. First, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred."

Similar considerations apply to lay-off. See, for example, *Tillotson-Sekisui Plastics Limited*, [1979] OLRB Rep. Oct. 1027, a case involving a complaint in respect of the lay-off of twenty-three employees, in which the Board noted (at paragraph 11):

"This matter falls within the ambit of section 79(4a) [now section 89(5)] which places the burden of proof in a complaint such as this upon the employer. The Board referred to the nature of the onus which falls to the respondent in these matters in the *Pop Shoppe (Toronto Limited)* [1976] OLRB Rep. June 299, wherein at paragraph 4 the Board stated"

'Section 79(4a) of *The Labour Relations Act* places the legal burden upon the employer in complaints such as the one before us, to satisfy the Board, on the balance of probabilities, that it has not violated the Act. In order for the Board to find that there has been no violation of the Act it must be satisfied that the employer's actions were not in any way motivated by anti union sentiment; the employer's actions must be devoid of 'anti-union animus.' (See the *Bushnell* case (1974), 4 O.R. (2d) 332.) The employer cannot engage in anti union activity under the guise of just cause or under the guise of business reasons. Regardless of the viable non-union reasons which exist the Board must be satisfied that there does not co-exist in the mind of the employer an anti-union motive. The employer best satisfies the Board in this regard by coming forth with a credible explanation for the impugned activity which is free of anti union motive and which the evidence establishes to be the only reason for its conduct. (See *Barrie Examiner* [1975] OLRB Rep. Oct 745 and *The Corporation of the City of London* [1976] OLRB Rep. Jan. 99.)"

(See also the *Starplex* case, *supra*; *Knud Simonsen Industries Limited*, [1980] OLRB Rep. Oct. 1466; *B & S Furniture Manufacturing Limited*, [1980] OLRB Rep. May 645; and *Accutext Limited*, [1980] OLRB Rep. Feb. 131.)

21. In cases to which section 89(5) applies, the Board is not primarily concerned with the fairness or lack of fairness in the conduct of the employer. Rather, the Board's concern is whether the conduct of the employer was in any way tainted by anti-union motivation. Nevertheless, in making that determination, the Board must consider all of the surrounding circumstances. As indicated in the *Pop Shoppe* case, *supra*, at paragraph 5:

"In cases such as these the Board is very often required to render a determination based on inferential reasoning. An employer does not normally incriminate himself and yet the real reason or reasons for the employer's actions lie within his knowledge. The Board, therefore, in assessing the employer's explanation must look to all of the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer's knowledge of it, unusual or atypical conduct by the employer following upon his knowledge of trade union activity, previous anti union conduct and any other 'peculiarities' (See *National Automatic Vending Co. Ltd.* case 63 CLLC ¶16,278)"

22. In applying those principles to the evidence before us in the present case, the Board finds a number of "peculiarities". As indicated above, the respondent admittedly violated the Act during the complainant's organizing campaign in the spring of 1981. In particular, on or about May 25, 1981, Mr. Bogue, who did not testify in present proceedings, told Beverley Lowther, one of the R.N.'s employed by the respondent, that he only needed two registered nurses to maintain the nursing home and that the two that would remain were the ones who had not signed cards. It was Ms. Pollard's evidence that she "did not speak with anyone else from management" while formulating her view concerning the respondent's nursing requirements. However, during cross-examination she stated that she "[could] not recall" if she had any discussion with any other member of management as to whether there was any reason for not employing R.N.'s at the Home. Having regard to Ms. Pollard's demeanour as a witness and all of the relevant circumstances, including the fact that Ms. Pollard was a newly appointed Director of Nursing with no previous nursing experience at the Home, we are unable to give credence to her testimony that she acted entirely on her own initiative in reviewing the Home's nursing requirements and formulating a recommendation with respect to the 7:00 — 11:00 a.m. shift. Ms. Pollard testified during examination in chief that the death or transfer of "three or four" heavy care patients "between September and October of 1981" was one of the factors that resulted in her recommending that the 7:00 — 11:00 a.m. shift be staffed by an R.N.A. instead of an R.N. However, she also testified that she "made up [her] mind around the latter part of August or the first part of September as to the requirement of nursing hours" and concluded that an R.N.A. could handle the 7:00 — 11:00 a.m. shift. Thus, it appears that she had already "made up her mind" before most, if not all of the deaths and transfers occurred. Although it is clear that some relatively heavy care patients did leave the Home during the fall of 1981, having regard to all of the evidence including the extensive expert evidence adduced by the complainant concerning the probably effect of such change on the Home's overall nursing requirements, the Board is not satisfied that the departure of those patients from the Home and the resumption of a full-time nursing position by Ms. Sager were the only reasons for the substitution of an R.N.A. for the R.N. on the 7:00 — 11:00 a.m. shift and the lay-off of Ms. Farquhar and Ms. Ruttan. Moreover, we are not satisfied that management had a bona fide belief that Ms. Sager was entitled to displace other R.N.'s in order to resume a full-time position.

23. Having regard to all of the evidence before us, we find that the lay-off of Ms. Ruttan, a known supporter of the complainant, together with the lay-off of Ms. Farquhar, in order to give increased hours to Ms. Sager, a known opponent of the complainant, was at least partially motivated by anti-union animus, as was the substitution of an R.N.A. for the R.N. on the 7:00 — 11:00 a.m. shift. The respondent's favourable treatment of Ms. Sager who testified against the complainant in the certification proceedings, is quite evident. She was granted an unrequested retroactive leave of absence after "quitting" her employment following the certification hearing. She was permitted to return to full-time employment at the time of her choice despite the fact that this would result in the lay-off of at least one other R.N., the avoidance of which was one of the reasons why she was permitted to work part-time in the first place. In the circumstances of this case, it is reasonable to infer that Ms. Sager's opposition to the certification of the complainant was at least one of the factors that prompted the respondent to convert Ms. Sager's status from that of a person who had quit her employment into that of an employee on leave of absence. Thus, the very act of granting her that leave, which had the effect of preserving her "seniority" and thereby protecting her from lay-off, was itself tainted by anti-union animus.

24. For the foregoing reasons, the Board finds that the respondent contravened sections 66 and 70 of the Act by laying-off Ms. Farquhar and Ms. Ruttan on October 14, 1981. The Board further finds that those lay-offs were a contravention of section 64 of the Act, as was the substitution of an R.N.A. for an R.N. on the 7:00 — 11:00 a.m. shift. In view of these findings, it is unnecessary for the Board to determine whether the respondent's actions also contravened section 79 of the Act as alleged by the complainant.

25. When Ms. Pollard resigned, Ms. Sager was appointed as Director of Nursing effective November 16, 1981. On November 10, 1981 Ms. McKinnon offered to recall Ms. Ruttan effective November 16, 1981 to fill the vacancy created by Ms. Sager's promotion but Ms. Ruttan declined to accept recall because she had accepted a position with another employer commencing November 16, 1981. Ms. Farquhar was also recalled on November 10, 1981, but declined to return to work.

26. In his submissions to the Board, counsel for the complainant indicated that his client was seeking compensation with interest for Ms. Ruttan but was not seeking compensation for Ms. Farquhar because the evidence before the Board indicated that she had so restricted her availability to work at the Home as to disentitle herself to compensation. The complainant also sought an order that all of the work that can legally be performed by either an R.N. or an R.N.A. be assigned exclusively to R.N.'s during the period of the "statutory freeze". However, the Board finds that the complainant is not entitled to such an order. An order of that breadth would ignore the respondent's past practice of assigning at least some of such work to R.N.A.'s, and would elevate a "preference" of the employer for hiring R.N.'s during a period in which they were readily available, to a "term or condition of employment" or a "right" or "privilege" of the employees. The Board is of the view that the respondent's "right" or "privilege" to make such assignment, at least to the extent that it had done so in the past, is preserved by section 79 of the *Labour Relations Act*, and also by section 13 of the *Hospital Labour Disputes Arbitration Act*, R.S.O. 1980, c. 205. Of course, the exercise of that "right" or "privilege" must be motivated exclusively by bona fide business considerations and must not be tainted by anti-union animus. (See, for example, *Corporation of the Town of Petrolia*, [1981] OLRB Rep. Mar. 261, and the authorities cited therein; cf. *Rest Haven Nursing Home*, [1979] OLRB Rep. June 554, in which the Board found a breach of the

“freeze” where the employer radically departed from “business as before” by eliminating the entire classification of R.N.A. from the bargaining unit through a decision to assign the job functions of that classification to a different group of employees.)

27. The Board therefore orders:

- (1) that Ruth Ruttan be fully compensated for all lost wages and benefits sustained from October 14, 1981 to November 16, 1981, through the respondent's contravention of the Act;
 - (2) that the respondent pay interest on the compensation for lost wages ordered by the Board, such interest to be calculated in the manner described in Practice Note No. 13, dated September 8, 1980;
 - (3) that the respondent forthwith schedule a registered nurse rather than a registered nursing assistant to work on its 7:00 — 11:00 a.m. shift;
 - (4) that the respondent post copies of the attached notice marked “Appendix”, after being duly signed by the respondent's representative, in conspicuous places on its premises where it is likely to come to the attention of the employees, and keep the notices posted for sixty consecutive working days. Reasonable steps shall be taken by the respondent to insure that the said notices are not altered, defaced or covered by any other material. Reasonable physical access to the premises shall be given by the respondent to a representative of the complainant so that the complainant can satisfy itself that this posting requirement is being complied with.
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Appendix

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH WE AND THE UNION PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY LAYING OFF RUTH RUTTAN AND JOAN FARQUHAR AND BY SUSTITUTING AN R.N.A. FOR AN R.N. ON THE 7:00 - 11:00 A.M. SHIFT.

THIS ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING,

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

WE WILL NOT LAY OFF ANY EMPLOYEE BECAUSE SHE HAS SELECTED THE ONTARIO NURSES ASSOCIATION AS HER EXCLUSIVE BARGAINING REPRESENTATIVE OR BECAUSE SHE IS EXERCISING ANY OTHER RIGHTS UNDER THE LABOUR RELATIONS ACT.

WE WILL FULLY COMPENSATE RUTH RUTTAN FOR ALL LOST WAGES AND BENEFITS SUSTAINED FROM OCTOBER 14, 1981, TO NOVEMBER 16, 1981, PLUS INTEREST.

WE WILL FORTHWITH SCHEDULE AN R.N. RATHER THAN AN R.N.A. TO WORK ON OUR 7:00 - 11:00 A.M. SHIFT.

EDWARD STREET MANOR NURSING HOME

(PER: (AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced

0611-81-U Eugene Vaillancourt, Complainant, v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., Local 222 and **General Motors of Canada Limited**, Oshawa, Ontario, Respondents,

Duty of Fair Representation – Unfair Labour Practice – Quality of union official's presentation at arbitration basis of complaint – Whether presentation so perfunctory and deficient as to be arbitrary – Whether denial of right to have grievor's own counsel at arbitration breach of Act

BEFORE: N. B. Satterfield, Vice-Chairman

APPEARANCES: *Eva E. Marszewski for the complainant; B. Chercover and D. Tyce for the U.A.W.; J. K. Cameron and John Orton for General Motors of Canada Limited.*

DECISION OF THE BOARD; February 9, 1982

1. This is a complaint filed under section 89 (formerly section 79) of the *Labour Relations Act* in which the complainant alleges that he has been dealt with by the respondent trade union in a manner which is in violation of section 68 and section 69 (formerly section 60 and section 60a) of the Act. Section 68 states as follows:

“A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

Section 69 has no application to the circumstances of this case and the complaint is dismissed with respect to the alleged violation of that section.

2. The complaint alleges that the violation of section 68 arises from the following acts or omissions:

“The Respondent's trade union denied the Complainant his request to be represented by the counsel at the Arbitration heard by Mr. E. E. Palmer on October 31, 1981.

The Respondent's representative presenting the Complainant's case before the Arbitrator acted in an arbitrary, discriminatory manner, and in bad faith towards the Complainant in that he, Mr. D. Tyce:

- (a) Did not call any medical evidence by way of medical reports or expert witnesses to provide the Arbitrator with evidence regarding the Complainant's physical ailment and disability which prevented him from performing the jobs that he had been assigned to do between April 26, 1979, when the Complainant was injured, and November 27, 1979, when the Complainant was fired.

- (b) Did not call any other employees assigned to the types of jobs to which the Complainant had been assigned after his industrial accident on April 26, 1979, to provide the Arbitrator with evidence to demonstrate the type of physical strain involved in —
 - (i) the installation of headlights,
 - (ii) glove-box assembly,
 - (iii) installation of radiator hose,
 - (iv) hood installation.
- (c) Did not adduce any evidence to indicate what different types of jobs the Complainant was physically capable of carrying out, which his seniority would have entitled him to be assigned to.
- (d) Did not adduce any evidence to demonstrate to the Arbitrator the bad faith and the arbitrary and discriminatory manner of the employer's placement officer who was charged with finding suitable jobs for the Complainant which he can do (65(a) of the Collective Agreement) after he had been injured while in the course of his employment.
- (e) Did not permit the Complainant to see or review the brief submitted by the employer to the Arbitration in the matter of the Complainant's grievance in order to enable him to review same and comment on it.
- (f) He presented the Grievor's case before the Arbitrator in an inadequate, totally perfunctory and arbitrary manner thus demonstrating the Respondent trade Union's bad faith toward the Complainant."

3. The complaint was made June 18, 1981 and, during five days of hearings over a period of three months, the Board heard the testimony of 11 witnesses, including three medical doctors and received 44 documents in evidence. The Board has reviewed all of the oral and documentary evidence and the findings of fact herein are the material facts based on all of that evidence and the Board's assessment of the various witnesses' recollection of events, their demeanor and relative credibility.

4. This complaint differs from the majority of the ones that come before the Board alleging violation of section 68 of the Act in that it involves the quality of representation accorded the complainant, Eugene Vaillancourt, by the respondent trade union, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("the U.A.W."), Local 222 ("Local 222") through the international representative of the U.A.W., Dennis Tyce. The vast majority of complaints involving section 68 involves complaints that a union has refused or failed to process an employee's grievance, particularly refusing to take a grievance to arbitration. While the events bearing directly on the grievance

which was arbitrated began with Vaillancourt's discharge on November 27, 1979 by the employer, General Motors of Canada Limited ("G.M."), for refusing to do the job to which he had been assigned, it is useful to summarize the facts with respect to other events leading up to the discharge.

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(An extensive review of evidence leading up to the discharge and the filing of the grievance omitted).

12. Local 222 filed a grievance on Vaillancourt's behalf on the same day when he was discharged, November 27th. Dennis Tyce became involved with Vaillancourt's dismissal after it was grieved. He has been an international representative of the U.A.W. since 1969 and serves all of G.M.'s plants in Canada and is the U.A.W. Canadian Director's special representative assigned to its Ontario plants. Prior to joining the staff of the U.A.W., he had been employed by G.M. in its Oshawa plant complex and was a shop committeeman there since 1951. His involvement with Vaillancourt's grievance began at the fourth step, which is the last step before arbitration and the step at which he usually participates pursuant to the procedure and Tyce described to the Board the steps relevant to Vaillancourt's grievance. It was discussed at the third step between the appropriate representatives of Local 222 and G.M.. When G.M. denied the grievance, Local 222 filed with G.M. on December 14, 1979 a "Notice of Intention to Appeal" the grievance as provided in the fourth step procedure. Following that giving of notice, both parties prepared and exchanged a "Statement of Unadjusted Grievance" which is a statement in support of their respective positions at the third step. Tyce received a copy of each party's statement together with the minutes of the third step grievance meeting and a copy of the grievance following which he met with representatives of Local 222 about Vaillancourt's grievance. Next he sent a "Notice of Appeal" to G.M. and made arrangements for the fourth step meeting. Tyce attended at G.M. in January 1980 for the fourth step meeting and represented Local 222 and Vaillancourt at the meeting. Grievors do not attend this meeting. Vaillancourt's grievance was one of some 120 that were dealt with in eight days of meetings between the parties beginning January 21, 1980 and ending February 1, 1980. G.M. has five days after the fourth step meeting to give its reply to Local 222. The Local considers the reply and writes to Tyce recommending whether to proceed further. Vaillancourt's grievance was one of 12 which the Local recommended to Tyce be taken to arbitration. Tyce notified G.M. immediately that it was going to arbitration on Vaillancourt's grievance. He does this automatically with any grievance which the Local indicates it wants to pursue, even though the final decision has not been made, so to not miss the time limits for filing. A grievance may be settled or withdrawn before arbitration and of the 12 grievances, Vaillancourt's was the only one which proceeded to arbitration. As a matter of fact, it was the only grievance filed in 1979 which was arbitrated. This approach is possible because of the terms of appointment of the arbitrator.

13. When a grievance does go to arbitration, paragraph 37 of the agreement provides that the arbitrator be given copies of the written grievance, the written decisions at each step of the grievance procedure, the statements of unadjusted grievances which were exchanged between the parties preparatory to the fourth step meeting and the minutes of that meeting. This was done for Vaillancourt's grievance. As a result of this stipulation, the two parties have operated with the expectation and understanding that all evidence will be in by the end of the fourth step meeting. It is very clear from the evidence before the Board that either party would

oppose strongly any attempt by the other one to introduce new evidence at arbitration. The agreement, in paragraph 39(a), provides also that the parties may agree in writing, before the hearing, to direct the arbitrator to issue a memorandum decision. This is a decision without reasons and must be rendered within 10 days after the hearing instead of 30 days. G.M. and the U.A.W. availed themselves of this provision for the arbitration of Vaillancourt's grievance. Tyce always presents the U.A.W.'s case at arbitration with G.M. He told the Board that, in all of his experience neither party had used a lawyer at arbitration.

14. At the fourth step meeting Tyce attempted to have Vaillancourt's grievance dealt with under paragraph 38 of the agreement which would have referred him for an impartial medical opinion which would have been binding on the parties and Vaillancourt. He was unsuccessful because the paragraph applies only when there is conflict in the medical opinion of a doctor acting for G.M. and a doctor acting for an employee. The reports of Dr. Winnett and the Workmen's Compensation Board Clinic indicated that Vaillancourt could do the headlight job which he had refused.

15. Tyce's first act to prepare for arbitration was to get a release from Vaillancourt so that Tyce could obtain the reports on which G.M. was relying. He asked Vaillancourt on March 17th and received it on April 9th. He obtained the reports from G.M. and later received some additional ones from Vaillancourt. Some of these were medical opinions which Vaillancourt had obtained from the orthopedic clinic at The Wellesley Hospital after his discharge as well as reports which went back to the period after his 1974 accident. Tyce decided not to use these latter reports because he saw them as not relevant to the reports on which G.M. was relying. The Wellesley reports he considered to contain statements harmful to Vaillancourt's care as well as being after-the-fact evidence. It was mid-October when he received copies of the Wellesley medical opinions from Vaillancourt. By then Tyce had already told Vaillancourt that his strategy in the arbitration would be to convince the arbitrator that Vaillancourt was suffering intense low back pain, had refused the job for that reason and that was not just cause for dismissal. Vaillancourt had told him that there was not a job in the plant which he could do because of the pain and Tyce had decided his best strategy was to have Vaillancourt try and convince the arbitrator of his pain. For that reason, Tyce saw no need to have testimony from medical doctors. Vaillancourt's advice to Tyce that there was no job in the plant which he could do was consistent with what he told at least two other persons because Hayes and Dr. Jones both testified independently at the Board's hearings that Vaillancourt had told them that there was not a job in the plant which he could do. The closest he came to saying that there might be one job which he could do, according to Hayes' evidence, was three hours into the third step grievance meeting when Vaillancourt suggested that he might be able to do his former hood insulation job. As noted in paragraphs 5 and 7 above that is the job on which he was working when the April 26, 1979 accident occurred and the same job which, when he first returned to work following the accident, he told his foreman Savage he could not do.

16. Tyce also viewed the same video tapes of the two jobs which Dr. Winnett had seen and then went to the plant with a Local 222 committeeman for the purpose of observing the jobs and satisfying himself that they were as shown on the tapes. Since the lines were not operating, he had to settle for a demonstration of one job and an explanation of the other. As another part of his preparation, Tyce verified that an employee who had complained of back pain after working full shifts on the headlight job had never been on leave of absence from the job and her testimony would not be useful. He ruled out as well seeking other employees who

may have complained of pain while doing jobs which had been offered to Vaillancourt because Tyce knew them to be the easiest jobs in the plant.

17. As a result of his investigation of the complaint and his review of the medical reports, Tyce was of the opinion that Vaillancourt's grievance was a weak case for arbitration and his best chances would be with the strategy referred to above. He advised Vaillancourt of his opinion and told Vaillancourt he would be relying on him to convince the arbitrator of his pain. Vaillancourt voiced no opposition to the plan. Before the matter got to arbitration Tyce discussed with G.M. the prospect of settling the grievance. Two separate proposals were forthcoming which he deemed worthy of being offered to Vaillancourt. He rejected both.

18. The grievance was scheduled to be heard on October 23, 1980. The parties appeared, but the arbitrator did not. The matter was heard on October 30th. The parties proceeded before the arbitrator by reading their prepared briefs and calling witnesses. This is their normal way of proceeding. The party going first gives the other party a copy of its brief before it is read to the arbitrator. Tyce had given Vaillancourt his brief on October 23rd. It had been prepared on the "pain" strategy Vaillancourt had decided upon and sought to have the discharge overturned and to have Vaillancourt placed on sick leave. Vaillancourt made no objections to the brief. Tyce cross-examined from Dr. Jones the admission that he could not tell if a person was suffering pain. In this respect it is worthy of note that at the Board's hearings, Jones and the other two medical doctors who testified stated that they could not tell with certainty whether a person was suffering pain, but all of them acknowledged that they believed Vaillancourt did even though they could not find objective evidence of its cause. Tyce called as witnesses Vaillancourt and the union committeeman with whom he had visited the plant to view the jobs. The hearing lasted between two and three hours.

19. When the arbitrator's report was rendered it upheld Vaillancourt's discharge. Vaillancourt was given a copy of the report.

20. Several times during the period prior to the arbitration hearing, the first time March 17th and the last time October 21st, Vaillancourt alternately told Tyce that he wanted to be represented at the arbitration by his own lawyer or that he would have his lawyer there. Tyce told him that he would represent Vaillancourt at the arbitration, preferred not to have Vaillancourt's lawyer there and expected that G.M. would object to the presence of a lawyer representing a grievor. Tyce told the Board that he felt it would have been contrary to the relationship which had been built up between the parties over many years to allow Vaillancourt to be represented at the arbitration by his own counsel. As a result, Vaillancourt did not appear with counsel but did bring another person with him who was unknown to Tyce.

21. The foregoing fact situation forms the basis from which the Board must determine whether, as the complainant Vaillancourt has alleged, Tyce "... acted in an arbitrary, discriminatory manner, and in bad faith towards [V.]" in Tyce's representation of him at the arbitration of Vaillancourt's grievance pursuant to the agreement and, therefore, whether U.A.W. Local 222 has violated section 68 of the Act. The standard which the Board applies in seeking an answer to that question was set out in the following words of its decision in *Ford Motor Company Limited*, [1973] OLRB Rep. Oct. 519, paragraph 40:

"40. In deciding whether a union has violated the Act the standards to be applied are important. We recognize that union affairs are conducted

for the most part by laymen. In some situations there are experienced full time officials of a trade union who conduct the union affairs; in other situations, the union affairs are conducted by employees in their spare time, while in yet other situations employees may be given a limited amount of paid time by their employers to engage in trade union matters. This Board does not decide cases on the basis of whether a mistake may have been made or whether there was negligence, nor is the standard based on what this Board might have done in a particular situation after having the leisure and time to reflect upon the merits. Rather, the standard must consider the persons who are performing the collective bargaining functions, the norms of the industrial community and the measures and solutions that have gained acceptance within that community; ...”.

As can be seen from the Board’s comments, a significant element of that standard is the experience and level of authority of the union officials who made the representation decisions on which the alleged violation is based. Its significance is readily evident from the Board’s decision in *Walter Prinesdomu*, [1975] OLRB Rep. May 444, at paragraph 27:

“... at least flagrant errors in processing grievances — errors consistent with a ‘not caring’ attitude — must be inconsistent with the duty of fair representation. An approach to a grievance may be wrong or a provision inadvertently overlooked and section 60 [now section 68] has no application. The duty is not designed to remedy these kinds of errors. *But when the importance of the grievance is taken into account and the experience and identity of the decision-maker ascertained* the Board may decide that a course of conduct is so implausible, so summary or so reckless to be unworthy, of protection.”. (emphasis added)

22. Since those two decisions issued the Board has heard many complaints dealing with alleged failures by trade unions of their duty of fair representation enunciated by section 68 and the Board’s decision in these complaints have served to confirm and consolidate the standards set forth in its decisions in *Ford* and *Walter Prinesdomu*, *supra*. One of the more recent of these decisions, *ITE Industries Limited*, [1980] OLRB Rep. July 1001, in which the Board reviewed the purpose of section 68 (section 60 at the time), the standard of conduct prescribed in *Ford*, *supra*, and the Board’s discourse in *Walter Prinesdomu*, *supra*, on the meaning of the word arbitrary as used in the section, summarized in the following terms the kind of conduct which must be demonstrated for a breach of the section to be established:

“19. It is clear that in order to establish a breach of section 60, a complainant must do more than demonstrate an honest mistake or even negligence. The union must have committed a “flagrant error” consistent with a “non caring attitude”, or have acted in a manner that is “implausible” or “so reckless as to be unworthy of protection”. In other words, the trade union’s conduct must be so unreasonable, capricious, or grossly negligent, that the Board can conclude that the union simply did not give sufficient consideration to the individual employee’s concerns. Honest mistakes or innocent misunderstandings are clearly beyond these parameters and do not attract liability.”

23. There can be no doubting the importance of the grievance, at least to Vaillancourt, as it involved his very livelihood and nearly seven years of seniority with G.M.. His interest at arbitration were represented, on behalf of U.A.W. Local 222, by Tyce who for 18 years held office in Local 222 and for 10 years has been the international representative of the U.A.W. who services G.M.'s plants in Canada and is special representative for the Canadian Director of the U.A.W. at G.M.'s Ontario plants. His conduct, therefore, in handling Vaillancourt's grievance must be assessed in light of his experience and the level of responsibility attached to his office. He is obviously a full-time, paid union official and has had extensive experience dealing with representation issues. He deals with all grievances at the fourth step, the last one prior to arbitration, and prepares and presents the grievances at arbitration on behalf of the local unions and their members. It is Tyce's conduct in representing Vaillancourt at arbitration which the Board must examine in order to determine whether Local 222 has failed in its section 68 duty of fair representation. His extensive experience both as an elected representative of Local 222 and as an appointed, full-time, paid representative of the U.A.W. demands, for the purposes of a section 68 determination, a high quality of representation. In deciding whether Tyce has met these standards of conduct, the Board has had the benefit of extensive and able argument from counsel for Vaillancourt, Local 222 and G.M., including their assessments of the evidence and the conclusions which, in their views, should be drawn from the evidence. All of their representations have been weighed by the Board in reaching its conclusions, both as to the findings of facts set out above and as to the conclusions reached hereunder on those facts.

24. Those facts reveal that Tyce first became involved with Vaillancourt's grievances after it was denied by G.M. at the third step of the grievance procedure. He filed the Notice of Appeal which progressed it to the fourth step. At that step he sought to have paragraph 38 of the agreement apply so as to divert the grievance from possible arbitration to determination by an impartial medical opinion. When this failed and G.M. again denied the grievance, he acted on Local 222's recommendation that the grievance go to arbitration by serving notice to that effect on G.M.. Thereafter he began deliberately and methodically to prepare for arbitration by obtaining and reviewing the relevant medical reports, by verifying for himself the jobs which were considered by the specialist whose opinion Vaillancourt had sought and by directing others to investigate whether his case might be aided by evidence from the employee Debbie Graham. He rejected the use of any of the medical reports, including those which he considered to be after-the-fact evidence, as being harmful to the chances of succeeding with Vaillancourt's grievance. He considered and discarded the possibility of having Debbie Graham testify on the basis that, while she claimed to have suffered back pain after working full time because of the pain, she had not lost time because of it. He decided that no purpose would be served by having medical doctors testify at the arbitration because Vaillancourt had told him that there were no jobs which he could do and Tyce had decided that his best strategy was to focus on Vaillancourt's back pain as justifiable reason for his refusal to do the job to which G.M. had assigned him. While Tyce did not investigate to see if there were other jobs beyond those which G.M. had offered to Vaillancourt or which Vaillancourt considered and rejected, it was obvious from his testimony that he knew that was not the issue from his personal knowledge of jobs in the Oshawa complex and the way in which the parties had operated under paragraph 65 of the agreement.

25. Tyce assessed the prospects of winning the grievance, decided they were not good and determined what he thought was the best strategy in the circumstances. Having done so he told Vaillancourt what it was and that his role would be to convince the arbitrator that his low

back pain was the cause of his refusal to perform the job to which he had been assigned. He also attempted to find an acceptable settlement without arbitration as a result of which two proposals were made to and rejected by Vaillancourt.

26. At the arbitration Tyce pursued his strategy and cross-examined G.M.' witnesses in accordance with his aim to support the contention that Vaillancourt was justified in refusing the headlight job because of the pain which he was suffering, that there was no just cause for discharge and that Vaillancourt should have been placed on sick leave until he was able to perform work to which his seniority entitled him.

27. Having decided to proceed to arbitration with Vaillancourt's grievance, Tyce has put his mind to all of the information which was reasonably available to him and formed his conclusions as to how the grievance could best be presented at arbitration. Then, after further efforts to find a settlement, he has presented what he considered to be the best case he had for the grievor. Moreover, the evidence establishes conclusively that Tyce has done these things in a manner wholly consistent with his experience and level of responsibility.

28. Counsel for Vaillancourt contends that the shortness and simplicity of Tyce's brief at arbitration compared with the relatively longer and detailed brief of G.M. together with the short length of time it took for him to put in his case in chief in relation to G.M., were characteristic of him "going through the motions" on behalf of Vaillancourt and demonstrates that his case was so deficient of substance and so perfunctory and summary as to be arbitrary. It is readily conceivable that a union could go to arbitration merely to "make a show" of representing an employee rather than make the politically unpopular decision not to take his grievance to arbitration. In the instant case, however, the Board has had the opportunity of reviewing the parties' arbitration briefs, of hearing the testimony of Vaillancourt, the persons who dealt with him on behalf of G.M., including those who testified before the arbitrator, of Tyce, the doctor's who treated Vaillancourt, of reviewing the medical reports which were available to Tyce and of viewing the video tapes of the jobs in question as well as the hood insulation job. Having had that opportunity, the Board has no difficulty in concluding that Tyce's handling of the grievance was an act of substance and not one simply of form.

29. Insofar as Vaillancourt's request to be represented at arbitration by his own counsel is concerned, Tyce's refusal to allow Vaillancourt to be so represented or to have his counsel present the case was properly based on Tyce's consideration of the practice which had evolved at arbitration between the parties and the potentially detrimental effect which it might have on those relationships. Vaillancourt's counsel contended that Tyce should have stepped aside and allowed someone else, either counsel for Vaillancourt or counsel engaged by U.A.W., to present the case at arbitration because Tyce's handling of the grievance revealed a strong unwillingness to take it to arbitration. The facts simply do not support this contention.

30. Nor do the facts support the allegation that Tyce failed to adduce evidence to demonstrate at arbitration the "... bad faith and the arbitrary and discriminatory manner of the employer's placement officer who was charged with finding suitable jobs for [Vaillancourt] ...", because, not only was there no evidence before the Board of such bad faith, arbitrariness or discrimination by the placement officer, Hayes, the evidence presents a scenario opposite to that allegation.

31. The Board finds on all of the evidence before it, therefore, that Tyce did put his

mind properly, in good faith, without discrimination or arbitrariness to the merit of Vaillancourt's grievance and to its presentation at arbitration. While it is not the Board's task to decide whether it would have reached the same conclusions that Tyce did, the evidence before the Board would make it difficult to find that he should have reached different conclusions. Accordingly the Board finds that the respondent U.A.W. Local 222 has not acted in a manner that is arbitrary, discriminatory or in bad faith in its representation of Vaillancourt.

32. For the foregoing reasons with respect to section 68 of the Act and for the reason given at the outset of the decision in respect of section 69, the complaint is dismissed.

2476-80-R; 2478-80-U Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild (CLC-AFL-CIO), Applicant, v. **The Globe and Mail Division of Canadian Newspapers Company Limited**, Respondent, v. Group of Employees, Objectors; Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild (CLC-AFL-CIO), Complainant, v. **The Globe and Mail Division of Canadian Newspapers Company Limited**, Respondent.

Certification Where Act Contravened – Interference in Trade Unions – Unfair Labour Practice – Solicitation and remedying of employee grievances during organizational campaign – Whether justified by business reasons – Whether employees threatened – Whether letters to employees exceeding bounds of free speech – Whether Board certifying without vote

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members F.W. Murray and W.F. Rutherford.

APPEARANCES: *J. Sack, R. Aveling, Linda Torney and Malcolm Scott for the applicant/complainant; Ross Dunsmore, Orval Maguire, Brenda Biller and Ted Reczulski for the respondent; Don Robinson, Q.C., Thomas A. Stefanik, Dave Rothschild, George Crook and Mike Paxton for the objectors.*

DECISION OF THE BOARD; February 26, 1982

1. The Board directs that this application for certification, and complaint be and the same are hereby consolidated.

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3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour relations Act*.

4. Having regard to the agreement of the parties the Board further finds that all district sales representatives employed by the respondent in its circulation department in the Province

of Ontario, save and except branch supervisors and persons above the rank of branch supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and employees presently covered by subsisting collective agreements, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. The Board is satisfied on the basis of all the evidence before it that less than forty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on February 25, 1981, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. Subject to whatever determination is made under section 8 of the Act, the union in this case does not meet the statutory membership requirements for certification.

6. The union asks the Board to apply the provisions of what is now section 8 of the Act. Section 8 of the Act provides:

Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

7. The company publishes a morning newspaper six days per week. The newspaper is circulated in Metropolitan Toronto and vicinity through 8 branch offices. Four of these branches are within Metropolitan Toronto and are referred to as city branches (North, East, West and Central). The remaining branches are located in Oshawa, Richmond Hill, Mississauga and Bronte and are referred to as Retail Trading Zone (RTZ) Branches. Each branch has its own supervisor who is responsible for the day-to-day activities of the district sales representatives (DSR's) working within the Branch. Each DSR is assigned a district within the Branch. The branch supervisor reports to a field co-ordinator (one for the city branches and one for the RTZ branches) who in turn reports to a circulation manager (Mr. Don Clement). The Circulation Manager reports to the Single Copy Manager who is responsible for the distribution of the paper to not only homes but boxes and stores as well (Mr. Nick Russo). The Circulation Manager reports to the Director of Circulation (Mr. Ken Marskell) who in turn reports to the publisher. There are 76 DSR's working in both the city and the RTZ branches.

8. Union Activity commenced in mid-January, 1981 when Mr. Malcolm Scott, A DSR working in the East Branch, contacted Ms. Linda Torney, a local business representative of the applicant trade union. A meeting of the East Branch DSR's took place at Mr. Scott's home on January 27th. The 9 DSR's from the East Branch who attended the meeting signed union membership cards. Mr. Torney testified that as a result of this meeting she thought that Mr. William McLeman, the union's Canadian Director, should become involved. She testified that she wanted to obtain authorization for an organizing drive. The union had been

decertified in 1977 after failing to conclude a first agreement. Although it was decided that the DSR's who had attended the January 27th meeting should begin to contact those in the other branches whom they knew on a personal basis to see if there was interest in the trade union, there was no decision made at this time to begin a general canvass. The union's evidence is that prior to February, 1981 contact had been made with at least one individual in six of the eight branches. Mr. McLeman attended a meeting at Mr. Scott's home on February 6th at which six or seven DSR's were present. These DSR's were instructed in how to sign an employee into membership and left the meeting with a list of the names of fellow DSR's to be contacted. When asked in cross-examination if the campaign had gone public by February 6th, Ms. Torney testified that the campaign had started but because collections were being done, the DSR's who had agreed to assist in contacting others did not have time to speak to other DSR's until the end of the week. Mr. Scott was in Sarnia on vacation from February 15th to February 18th inclusive. The application for certification was filed on February 16, 1981 and the terminal date was set for February 25, 1981. The evidence discloses that in addition to the nine cards signed on January 27th one card was signed on February 6th, another on February 11th and another on February 12th, another on February 20th, and a final card was signed on February 24, 1981. The union signed into membership 14 of the 76 DSR's falling within the bargaining unit. The union did not file membership cards signed by persons working in five of the eight branches. In explaining why only four cards were signed after February 6th, Ms. Torney testified that the initial supporters were no longer interested in being organizers. Mr. Scott testified that prior to February 6th individuals in 6 of the 8 branches had been contacted and "had been willing to get other DSR's to hear us" but that after February 6th they did not want to talk to us. Neither Ms. Torney nor Mr. Scott themselves attempted to sign into membership individual DSR's working in other than the East Branch.

9. Mr. Vern Thampe, the East Branch supervisor, became aware of the union activity within his branch on February 5, 1981. It is his evidence that on that day Mr. Scott and two of his colleagues, Messrs Farmer and Martin came to his office and asked to speak with him. He testified that they told him that the DSR's were attempting to unionize and that Mr. Scott told him that more than fifty-five per cent of the DSR's had been signed into membership and that "only a miracle can stop us". He testified that when asked why they would come to him as a member of management they told him that they trusted him and "never felt it was him but management." He told them that he did not want to hear any more. Mr. Scott gave a different version of the exchange. He testified that while in Mr. Thampe's office for a performance appraisal, Messrs. Farmer and Martin happened into the office. It is his evidence that Mr. Thampe asked if a union organizing campaign was going on and that Mr. Martin "spewed forth" that the union was organizing and going for certification. Neither Mr. Farmer nor Mr. Martin was called to give evidence. Following the meeting with Messrs. Scott, Farmer and Martin, Mr. Thampe contacted Mr. Jeff Nelson, the field co-ordinator and informed him of what he had just learned. He was instructed to do nothing until he heard back from Mr. Nelson.

10. Mr. Ernie Raftus, the North Branch supervisor, became aware of the union's organizing the next morning. He testified that he was with Messrs. Farmer (a personal friend) and Martin at a local tavern on January 6th and that the two East Branch DSR's spent three or four hours complaining about conditions in the East Branch. He was off work on February 6th and called Mr. Farmer, from his home, to see if he was interested in renting an apartment which he was vacating. During the course of that conversation Mr. Raftus asked Mr. Farmer if conditions in the East Branch had improved. Mr. Farmer replied that they were far worse. Mr.

Raftus testified that he then told Mr. Farmer that when he worked in the East Branch the DSR's felt they should form a union and asked him if there had been the same development. Mr. Farmer told him that there had been. Mr. Raftus then told Mr. Farmer that if he knew anyone interested in another point of view to have him call. Malcolm Scott called five minutes later. Mr. Scott acknowledged that he thought Mr. Raftus probably wanted to discuss union activities but testified that he didn't want to ignore a call from management. He also acknowledged that by returning the call he made it clear to management that he was the union organizer. Mr. Raftus asked Mr. Scott if they should be talking and, after Mr. Scott assured him, he spoke about the option of forming an employee association. He also suggested to Mr. Scott that he could provide a communication link with management. After some discussion on this point Mr. Scott said that he would consider speaking with the publisher of the newspaper but no one of a lower rank. Mr. Raftus did not attempt to solicit the names of those who were supporting the union and Mr. Scott answered in the negative when asked if any threats had been made. Immediately following his conversation with Mr. Scott Mr. Raftus contacted Mr. Nick Russo (Single Copy Manager) who was at the North Branch in the company of Mr. Jeff Nelson (City Branch Field Co-ordinator). Messrs. Russo and Nelson travelled to Mr. Raftus' residence and were told by Mr. Raftus that a union organizing drive was in progress. Mr. Raftus testified that when he identified job security as a pressing issue, Messrs. Russo and Nelson disagreed and felt that the larger issues involved hours, down routes and collections. Mr. Russo notified Mr. Ken Marskell (Circulation Manager) and a meeting of the branch supervisors was called for that afternoon.

11. The branch supervisors gathered at the company's head office at about 2:30 p.m. on February 6, 1981. Mr. Ken Marskell spoke to his staff for about twenty minutes at the beginning of the meeting. He advised his supervisors that employees had a right to organize and that they should not talk with employees about the formation of a union. Most of the branch supervisors had not been faced with a union organizing drive before. Mr. Marskell then asked why the DSR's were so disillusioned that they felt they needed a trade union. He asked the branch supervisors where they had failed. The company had assumed that many more DSR's had signed cards than actually had. Mr. Marskell took the position that if the DSR's were looking to unionize the branch supervisors had not been sensitive to the problems they were encountering in the field. Mr. Marskell asked the branch supervisors to identify these problems and to find solutions. Mr. Marskell left the meeting and the evidence is that the branch supervisors spent the next two hours discussing the possible reasons why the DSR's would have opted for a trade union. Mr. Thampe testified that he had never before attended a management meeting similar to this one.

12. A harsh winter can play havoc with the efficient circulation of a morning newspaper. The winter of 1981 was particularly harsh so that the circulation department was beset by a host of problems. There is no dispute on the evidence that the Globe and Mail was plagued by carrier turnover, down routes, customer complaints, arrears in collections and some trucking difficulties. The East Branch, where most of the DSR's had signed union membership cards, was particularly hard hit. Mr. Thampe, the branch supervisor, had been away from work for most of November and December. When he returned to work he found that the performance within the branch had deteriorated. The poor administration of the branch in his absence coupled with the effects of the harsh winter placed a heavy burden on the DSR's working within the branch. Mr. Russo testified in cross-examination that Mr. Marskell told his supervisors on February 6th that however much extra help and money was required to address these problems they should supply it. Mr. Marskell did not testify. Mr. Peter With, the Oshawa

Branch Supervisor at the time (since terminated) testified that his understanding was that the branch supervisors were to look after the problems in the field "at almost any cost" so as the employees would not have a reason to complain. The branch supervisors were instructed to hire extra help and \$2,000 to \$3,000 per branch per month, the equivalent of two part-time employees working under 24 hours per week each, was designated for this purpose. Mr. Russo testified that the money had been budgeted for the preceding October. In addition, Mr. Russo was given direct responsibility over the branches and immediately following the February 6th supervisors' meeting spent most of his time in the field. Mr. Marskell paid a personal visit to the Mississauga Branch.

13. The evidence in respect of Mr. Marskell's visit to the Mississauga Branch was given by Mr. Frank Barber, a DSR assigned to the Bronte Branch who was in the Mississauga Branch office at the time Mr. Marskell was there, and by Ms. Iris Swatuk, a DSR assigned to the Mississauga Branch. Mr. Barber testified that Mr. Marskell called the eight or nine DSR's present into the branch supervisor's office and asked "What's this I hear about a lot of problems? What do you want? Why so many routes down? What can we do to solve the problems?" It was suggested that extra help be hired to assist with the delivery of down routes. Mr. Marskell wrote down the suggestions. As the meeting was breaking up Mr. Marskell queried Mr. Barber concerning the situation in the Bronte branch. Mr. Barber informed him that there were no major problems but complained about his salary review. Mr. Marskell invited him to come down to head office to discuss the matter, which he did the following Monday or Tuesday. Mr. Barber had been to see Mr. Marskell at head office on previous occasions to discuss his employment problems. It is Mr. Barber's evidence that during the course of their conversation at head office, Mr. Marskell asked "Where's it coming from?" Mr. Barber thought he was referring to the union and told him that he had been contacted and named the person who had contacted him. Mr. Marskell did not pursue the matter but it is Mr. Barber's evidence that he asked him to keep him informed. Mr. Barber admitted in cross-examination that Mr. Marskell spent most of the time talking about business problems. Ms. Swatuk, who had seen Mr. Marskell in the Mississauga Branch office before, acknowledged that there were a number of down routes within the branch and that help was required at the time Mr. Marskell visited in February. She testified that help was provided and was continued until April when it was less difficult to attract carriers. She told Mr. Marskell that the branch office required blinds, garbage cans and a bulletin board and that the DSR's should have business cards. These were supplied following Mr. Marskell's visit to the branch. The business cards were a standard type with a place for the DSR to inscribe his name.

14. Mr. Raftus informed Mr. Marskell during the course of the February 6th supervisors' meeting of his conversation with Mr. Scott and asked Mr. Marskell if he would meet and discuss the district problems with him. Mr. Raftus testified that Mr. Marskell replied that he would meet with Mr. Scott to discuss district problems but not the formation of a trade union. Mr. Raftus called Mr. Scott about 6:00 p.m. that evening and told him that he had discussed the possibility of a meeting with Mr. Marskell but suggested that if Mr. Scott desired they could first meet alone. Mr. Raftus suggested they meet that evening. Mr. Scott suggested the next day. However, he later changed his mind and left a message for Mr. Raftus that evening that he would be unable to meet. Mr. Thampe also spoke with Mr. Scott on the evening of February 6th. He called Mr. Yong Ping, a DSR working in the East Branch, to inform him that he would not be able to attend a branch social function arranged for that evening. Mr. Scott was there and took the phone. It is Mr. Scott's evidence that Mr. Thampe told him who was present at the supervisors' meeting held that afternoon, that the meeting was

concerned with the union exclusively and that Mr. Russo was being brought in to handle the situation. Mr. Thampe, while acknowledging that Mr. Scott took the phone and asked a number of questions, denied that he gave Mr. Scott any information concerning the supervisors' meeting.

15. Mr. Russo spent a considerable amount of time at the East Branch during the week commencing Saturday, February 7th. He dropped into the Branch on Saturday February 7th. It is his evidence that he discussed job-related problems with Bob Martin. Mr. Russo testified that he visited the East Branch on Monday, February 9th and spoke privately with a number of the DSR's working in the branch about the problems they were experiencing in the field. He obtained hockey tickets for one DSR who had been promised them earlier but had not received them. It is his evidence that Mr. Scott, whom he did not recall meeting before, introduced himself and asked if he had a few minutes. Mr. Russo testified that Mr. Scott proceeded to tell him everything that was wrong with his job. Mr. Russo maintains that he told Mr. Scott he would look into the status of his performance review but denied that the subject of a union arose during their 45 minute discussion. Mr. Russo testified that in response to the concerns expressed by Mr. Scott with respect to his job security he showed Mr. Scott an issue of "Canadian Business" which was in his brief case. Mr. Russo maintains he showed Mr. Scott the February issue, which contained an article dealing with how difficult it is to terminate an employee, for the purpose of reassuring him with respect to job security. He denies that he showed Mr. Scott the January issue with a sketch showing an employee being kicked out the door. It is Mr. Russo's evidence that on February 11th he arrived at the East Branch at 6:00 a.m., "sat on the control box" and witnessed an "incredible" number of complaints. He testified that Mr. Scott came into the office at about 9:30 a.m. at which time his performance review was completed. He denied that Mr. Scott had been summoned to the office. Mr. Russo testified that the meeting ended at 10:20 a.m. when Mr. Scott asked to see him alone for a minute. It is Mr. Russo's evidence that when they were alone Mr. Scott said to him "I am the man you are looking for", and told him that he was the individual organizing the union and that he was not afraid of the Globe. Mr. Russo maintains that he did not respond. Mr. Russo visited the West Branch on Thursday February 12th and spoke with a number of DSR's about their work-related problems. He visited the central branch on Friday, February 13th and again queried branch personnel about their work-related problems.

16. Mr. Scott's recollection of his meetings with Mr. Russo during the week commencing Saturday, February 7th is not the same as Mr. Russo's. Mr. Scott does not recall meeting Mr. Russo on Monday, February 9th. However, it is his evidence that Mr. Russo was in the branch office on Tuesday, February 10th interviewing DSR's and that Mr. Thampe told him not to leave without seeing Mr. Russo. Mr. Scott recalls that he got to see Mr. Russo at about 12:30 p.m. after he had spoken with three other DSR's. It is Mr. Scott's evidence that Mr. Russo asked him what his job problems were, to which he replied that, along with a number of other problems, his salary review was 2½ months overdue. Mr. Scott testified that Mr. Russo then said "I understand the DSR's are trying to form a union". Mr. Scott maintains that he confirmed that this was the case and Mr. Russo then asked him how many people were involved, how many branches were involved and could it be stopped. Mr. Russo denies that he made any inquiries of Mr. Scott with respect to unionization. Mr. Scott testified that Mr. Russo next asked what the union would ask for and he mentioned job security and hours. It was in this context that he maintains Mr. Russo showed him an article in the January issue of "Canadian Business" entitled "Friendly Firings" and told him to read it. Mr. Scott testified in cross-examination that he is a person who can be intimidated by higher ups. He admitted,

however, that except for the article, which he did not read, he was not threatened by Mr. Russo. Mr. Scott also admitted in cross-examination that he had not been intimidated by either Mr. Raftus or Mr. Thampe.

17. Mr. Scott testified that the next day he arrived at the branch office at 9:45 and met with Messrs. Russo, Thampe and Nelson concerning his salary review. He maintains that afterwards Mr. Russo suggested that he and Mr. Scott go into another office. Mr. Scott testified that when they were alone Mr. Russo asked him the same questions as he had the day before, that he again referred to job security and hours and that Mr. Russo said he could break the back of the union by firing the 24 probationary DSR's. He testified that at this point Mr. Russo said that he would not fire him but let him sit without promotion. Mr. Russo denies making the remarks attributed to him by Mr. Scott.

18. The circulation problems which plagued the company at the time the union was attempting to organize existed prior to that time. Mr. Russo had agreed to travel to the branches and discuss the trucking problems which were being experienced at the end of January. Mr. Thampe who, as noted, returned from India to find his branch in severe difficulty, testified that he promised extra help to Mr. Scott in the second week of January after he had been moved to District #18. Mr. Scott testified in reply that he asked Mr. Nelson for help in November and Mr. Lucas in December but none was forthcoming. He testified that he approached Mr. Thampe in early January and was told no funds were available. The evidence is that the company budgets on a calendar year basis and would have been operating under its 1981 budget commencing January 1, 1981. Mr. Russo testified that the \$2,000 - \$3,000 which the branches used for extra help commencing in February would have been incorporated into the budget in October, 1980. Mr. Thampe gave uncontradicted evidence that extra help was hired to work in District 7 in mid-January. he also gave uncontradicted evidence that Mr. Farmer, who had eight down routes in District 9, was given help for eight weeks commencing in mid-January. Mr. Thampe met with Mr. Marskell the third week in January to discuss the problems he had encountered in the Branch upon his return to work. It is his evidence that he was told by Mr. Marskell to assess the problem and not to hesitate to take action. Mr. Raftus testified that he had been using additional adult help in the North Branch since mid-September. Mr. With testified that in the Oshawa Branch he was already supplied with extra help. The evidence is that in previous years the company responded to winter-related circulation problems by hiring part-time help to assist with the delivery of papers. Although the graph kept in the Circulation Manager's office depicting the paper's circulation did not show a loss at the relevant time, Mr. Russo testified that he sensed from the number of returns that the graph was in error. The graph was corrected at the end of February to accurately reflect the downward trend in circulation which had developed in January and February. Although Mr. Russo volunteered in cross-examination that the company had hoped to respond to the circulation difficulties with a spring promotion, he described the appropriate short term solution in re-examination as one of filling the routes as quickly as possible by hiring outside persons and sending recruiters to the schools.

19. The applicant trade union corresponded with the bargaining unit DSR's by letter dated February 10, 1981. The letter, over the signature of Linda Torney, reads:

DEAR CIRCULATION EMPLOYEE:

At the request of some of the Globe and Mail District Sales

Representatives in your department, the Southern Ontario Newspaper Guild has been contacting Circulation employees like yourself to determine the extent of interest in forming a union.

The initiators of this organizing drive are probably well known to you as they have worked openly in support of the Guild and have, along with others, signed membership cards in the union.

Your co-workers now need your support.

They are aware that the company has been speaking to employees about the union, and that various promises have been made to you. Much has been made of the company statements that "flexibility" will end if the union gets in. The union has never restricted individual initiative and many former Guild activists are now in management ranks. The Guild will not alter any conditions that are in the best interests of the majority of employees. Enclosed is a copy of a letter from Ken Marskell to City and RTZ District Sales Representatives, issued in September, 1977, during a previous Guild organizing drive. Please read it, and compare it to the promises made today.

Ontario law guarantees you the right to join a union without management interference. A copy of the applicable sections of the Ontario Labour Relations Act is enclosed.

The Guild does not like conducting organizing drives by mail. We would prefer to discuss with you the advantages of unionism in person and to answer any and all questions you may have about the Guild.

If you want to assist in the organizing drive, those of your fellow employees who are already actively working, will be delighted to have your help. However, if you wish to remain anonymous, your signed card will be seen only by yourself, the person who signed you, and the Labour Board. The Guild will respect your confidentiality and the company will never know.

A Guild representative will be contacting you to arrange a meeting to discuss your participation.

The attached letter from Mr. Marskell to DSR's is dated September 9, 1977 and deals with car allowance, salaries at other newspapers, hours of work, number of DSR's summer work load and call back from holidays. The letter concludes:

Working on a personal basis is the way I like it, and it means that I expect and want you to let me know your problems and your ideas for improvements. I believe as well that the District Representative structure that we have is much preferable to the structure at other newspapers.

As far as I am concerned, if you have problems, then I have problems as

well. The sooner that I hear about them and we resolve them together, the better it will be for all of us.

20. The Globe responded with a memo to its "City and Retail Trading Zone Sales Team" over the initials of Mr. Marskell, dated February 12, 1981. The memo reads:

Members of the staff are being approached by the Southern Ontario Newspaper Guild to support a drive which was launched to form a union in our department. The Guild has every right to do this and, of course, you have every right to act according to your best judgment and not join a union if you so desire. While you are considering the arguments put before you by the Guild, I want you to hear from the Company and understand my feelings about the relationship which now exists between us.

Your work as a district representative has been changing in the last few years. My door is always open and I have tried to be available to discuss any difficulties whatsoever or any ideas or suggestions that you wanted to put forward. My purpose is to resolve those difficulties as there is no more important function in the publishing of our newspaper than making certain that it continues to be delivered to our customers with the same quality and standard of service that you've given in the past.

Globe district representatives are the best paid in Toronto. Better paid than Star representatives in all yearly categories with the exception of year four, a matter at which we are now looking.

Each district representative receives a car allowance of at least \$3,300.00 every year. No other group at the Globe including those who are members of the Guild and covered by a union contract receive this much. To my knowledge, this minimum is the highest in Canada.

We are now about to launch what I believe to be the best training programs in North America for new representatives and for those of you who want to upgrade your status. To speed up your work and reduce the amount of time needed to operate as a district representative, I have also introduced mobile radios not only in the City, but only last month in the Retail Trading Zone as well.

We have experimented with a variety of shift systems but have found that by and large, you prefer to set your own schedules in a way that will best suit your own needs. This, interestingly, applies no matter what the season as it is a case of you doing it your way.

No one will deny that the early days of a district representative are difficult days and this is the case of any newspaper, not just the Globe. The learning period — or apprenticeship — is rough-going; but I believe that the new training courses will go a long way to prepare representatives for the supervision and management of their district. And once a

representative has learned the ropes, he or she is in a good job which gives him or her much of the freedom of an independent and enables him or her to enlarge their income.

A letter is an imperfect instrument to communicate my feelings about the way we work together and for me to understand your concerns about your career. If you would like to talk about it and problems that need resolving, give me a call.

It might be of interest to you to know of the management team of 15 in the City and Retail Trading Zone, all have come from the ranks of district representatives. You can make that 16 if you want to include me.

A follow-up memo of February 13th, also over the initials of Mr. Marskell reads:

When you are approached and asked to sign a union card in support of the Guild organizing drive, there are a few points about union membership that you should bear in mind.

1. You will all have to pay union dues if the Guild is certified even if you are not a union member,
2. Present Guild dues range, depending on salary from \$300.00 to \$500.00 a year. This may be increased annually.
3. When you receive any general increase in salary, the Guild takes the first week's increase in addition to union dues.
4. The Guild may require you to pay special assessments in addition to union dues.
5. A union card is a legal document. It means that you must submit to the rules and bylaws contained in the Union Constitution even if you disagree with them.
6. The Union Constitution requires that you obey the orders of the union executive and not do anything which is, in their opinion, against the interests of the union.
7. The union can put you on trial and cause you to be fined, suspended, or expelled from the union if you don't follow union rules.
8. You may be forced to go on strike when you don't want to.

Remember, if someone is asking you to sign a union card and give them \$300.00 to \$500.00 of your income each year, you should have all the facts first. Get a copy of the union Constitution and read it. Know what your future obligations will be before making any decision.

In closing, you should know that if more than 55 per cent of the district

representatives sign union cards, the union will automatically represent every one of you. There will never be a secret ballot vote in which you have the right to express your true wishes.

21. The union responded to each of the points contained in the company's February 13th memo with a memo of its own dated February 19, 1981. The memo states:

The director of circulation is obviously concerned that City and RTZ DSRs may join the Southern Ontario Newspaper Guild. In his hasty attempt to bring you all the facts that he considered pertinent to the question, he neglected a few points that I thought I should bring to your attention:

- 1: *You will all have to pay union dues if the Guild is certified even if you are not a union member.*

True, however the Guild collects *no dues* until a contract satisfactory to a majority of employees in your department is negotiated with the company.

2. *Present Guild dues range, depending on salary, from \$300.00 to \$500.00 a year. This may be increased annually.*

If your salary is \$300.00 a week, your union dues would be approximately \$4.50 per week.

- 3: *When you receive any general increase in salary, the Guild takes the first week's increase in addition to union dues.*

The Guild does ask members for the first week's negotiated increase when contract settlements are reached. This policy does *not* apply to experience increments during the contract or to merit increases.

This money is used to help pay the salary of your co-workers who negotiate your contract and have to be taken off the company payroll to do so.

- 4: *The Guild may require you to pay special assessments in addition to union dues.*

True - When the Guild's \$4 million strike defense fund is depleted it must be replenished.

- 5: *A union card is a legal document. It means that you must submit to the rules and by-laws contained in the Union Constitution even if you disagree with them.*

- 6: *The Union Constitution requires that you obey the orders of the union executive and not do anything which is, in their opinion, against the interests of the union.*

5 - 6: *True - The Guild's constitution is a document determined by its members as a code to follow. The company also has rules. What happens if you don't follow them?*

7: *The union can put you on trial and cause you to be fined, suspended, or expelled from the union if you don't follow union rules.*

True - However, each local is required to have a Trial Board. The Southern Ontario Newspaper Guild has one. It has never met as far as anyone can remember. No trials have taken place and no one has ever been disciplined.

8: *You may be forced to go on strike when you don't want to.*

The Union's executive cannot force you to go on strike. There will never be a strike unless the majority of employees in your department vote for it. The Guild accepts that in all cases the wish of the majority will prevail. If the company will bargain in good faith there need not ever be a strike. Remember, however, as a union you have a right to withhold your labour if you want to.

Before you make such an important decision, please talk to us. After all, the company has had their chance to talk to everyone individually about the negative aspects of unionization, now we would like to show you how you will gain. and, believe it or not, how the company will gain when the DSRs have a united voice. A couple of hours of your time could make a tremendous difference to your entire future.

22. There was filed in this matter a statement of desire in opposition to the trade union signed by 51 of the 76 DSR's in the bargaining unit. Because the union filed membership evidence on behalf of less than fifty-five per cent of those in the bargaining unit and is, therefore, not entitled to certification without a vote on the basis of its membership evidence, the Board was not required to conduct a formal inquiry into the voluntariness of the statement of desire. However, the union led evidence pertaining to the manner in which the statement was circulated. The statement of desire was circulated by Mr. David Rothschild who has opposed the trade union in previous campaigns. Mr. Frank Barber testified that Mr. Rothschild visited the Bronte Branch on two occasions. Mr. Billinghamurst, the supervisor, was in his office when he visited the first time. Mr. Barber testified that Mr. Rothschild was walking all over so that Mr. Billinghamurst would have to have seen him. However, Mr. Barber answered in the negative when asked if there was anything which in his mind connects Mr. Rothschild with management. Iris Swatuk was present in the Mississauga Branch office when Mr. Rothschild circulated the statement in opposition to the trade union. She testified that when he arrived the supervisor left and when he departed the supervisor returned. She testified that Mr. Rothschild approached the DSR's at their desks and explained that those who didn't sign were for the union. Mr. With gave evidence that following the February 6th supervisors' meeting the branch supervisors were instructed to minimize the inter-branch contact between DSR's.

23. The union asks the Board to find that the respondent employer unlawfully

interfered with its organizing campaign and that in the circumstances of this case the pre-conditions necessary to the issuance of a certificate pursuant to Section 8 of the Act have been established. The union argues that whereas in most of the reported cases the employer has used his position of influence to threaten employees, the respondent in this matter has used its position of influence to make promises and to bestow benefits. The union argues that regardless of whether the employer uses the “carrot or the stick”, if his actions are motivated by a desire to defeat the trade union they are in violation of the *Labour Relations Act*. The union relies on a series of American cases which deal with the giving of benefits and/or making of promises by an employer during the course of a union organizing campaign (see *re Exchange Parts Co.* (1964) 375 U.S. 405 (U.S. Sup. Ct.)).

24. The union asks the Board to take as its reference point in this matter the February 6, 1981 meeting of district supervisors called on short notice at the company’s downtown head office. The union asks the Board to find that prior to February 6th (or perhaps February 5th) the company had no knowledge of the union’s organizing activities and was carrying on business as usual. It is the union’s position that from and after February 6th, a dramatic change took place which can be directly attributable to the company’s knowledge of the union organizing. The union’s position is that prior to February 6th the many business-related problems referred to and relied upon by the company (carrier turnover, down routes, customer complaints, collections) existed but that it was only after it learned of the union’s organizing campaign that the “blank cheque” policy was put into effect and extra help was hired to assist the “overworked and understaffed” district sales representatives; that Nick Russo was given home delivery responsibilities and dispatched to the branch offices where he spent a disproportionate amount of his time at the East Branch; that Mr. Marskell visited the Mississauga Branch; that letters were sent to the district sales representatives over the signature of Mr. Marskell promising a training programme and promotion to management; and that those circulating a petition in opposition to the union were allowed to move between branches although the District Supervisors had been instructed to minimize inter-branch contact between the DSR’s. Although the evidence is that circulation was falling prior to February 6th, the union relies on the fact that the company’s graph depicting circulation, which hung in Mr. Clement’s office, did not indicate a problem as of February 6th and was not corrected until the end of February. Having regard to this fact and to the lack of a business response to its business problem prior to February 6th, the union asks the Board to conclude that when Mr. Marskell asked his branch supervisor on February 6th “How could you have done this to me?” he was referring to the union organizing drive and that the company initiatives which followed were unlawfully motivated by a desire to defeat the trade union. The union asks the Board to accept the evidence of Mr. Scott that he was told by Mr. Russo during the course of their February 11th meeting at the East Branch office that he would go no further with the company and that the union would be broken. The union asks the Board to draw a negative inference from the company’s failure to call Mr. Marskell. The union cites *American Airlines*, [1981] 3 Can. LRBR 90, a recent decision of the Canada Labour Relations Board, as setting down the proper limits on employer free speech during a union organizing campaign. The union asks the Board to find that the content of the letters circulated by the company to the DSR’s and the “rap sessions” engaged in by Mr. Russo and Mr. Marskell with the DSR’s exceeded the bounds of free speech and constituted undue influence by the employer.

25. The union attributes the collapse of its organizing campaign to unlawful company interference. Whereas, in Mr. Scott’s words, prior to company knowledge of the organizing “everyone wanted to talk” and was “very supportive”, a dramatic change in attitude

confronted the trade union after the company's unlawful response which, in the union's view, made it impossible to contact and sign more DSR's into membership. The union argues that the effect of the company's unlawful activity has made it impossible to ascertain the true wishes of the employees by means of a representation vote. Furthermore, it is the union's position that it has evidenced support adequate for collective bargaining. Relying on *Dominion Paving*, [1981] OLRB Rep. Oct. 1370, *Ottawa General Hospital*, [1981] OLRB Rep. Oct. 1461, *K-Mart Canada Limited (Peterborough)* [1981] OLRB Rep. Jan. 60 and *Upper Canadian Furniture*, [1981] OLRB Rep. July 1016, the union asks for the issuance of a certificate under section 8 of the Act. The union seeks the full panoply of remedies for the alleged breach of sections 64 and 66(c) of the Act including a cease and desist order, the posting of notices, access by union representatives to talk with employees, a list of employee names and addresses and compensation for its legal expenses, organizing expenses and interest.

26. In its submission the company frames the primary issue as one relating to the extent to which it is permitted to manage its business and to prevent the collapse of its distribution system. The company characterizes the union organization as symptomatic of the business situation the company found itself in and maintains that in the circumstances of this case a proper balance must be struck between the company's right to manage and the employees' right to unionize. Because Mr. Scott had said that the union had organized to the extent that "only a miracle can stop us", the company saw itself confronted with a major business problem affecting its circulation and, in the company's view, was entitled to respond to the problem which it perceived in the manner it did.

27. The company argues that the union satisfies none of the preconditions to the issuance of a certificate under section 8 of the Act. Although the members of the East Branch were signed into membership on January 27th, the company, relying on the evidence of Ms. Torney, the union representative, asserts that the real organizing was not to begin until after collections were completed on February 13th. This contact was not attempted by either Ms. Torney or Mr. Scott and in the absence of evidence from anyone who attempted to organize beyond the East Branch, the company asks the Board to find, on all the evidence before it, that the union was not able to organize because it lacked support among the employees outside the East Branch. The company maintains that only one card was signed on each of February 6, 11, 12, 20 and 24 because no real organizing was attempted during the week of February 9-15 because of the pressures of work and that no real organizing was attempted when Mr. Scott was on vacation between February 16-19. In the face of only 18 per cent support overall and no support whatsoever in five branches, and in the face of a petition in opposition to the union, signed by 51 of 76 DSR's which has not been shown to be anything other than a voluntary statement, and in the face of two prior unsuccessful attempts at representing the employees, the company asks the Board to find that the union has not evidenced support adequate for the purpose of collective bargaining within the meaning of section 8 of the Act.

28. The company relies on *Windsor Arms Hotel Limited* [1977] OLRB Rep. Dec. 859, *Radio Shack* [1979] OLRB Rep. Mar. 248 and *G. T. Courriers* [1979] OLRB Rep. Dec. 1167 in support of its position that only where an employer in some way makes the job security of his employees conditional on the outcome of the union's organizing attempt will the Board find that the true wishes of the employees cannot be ascertained by the taking of a representation vote. The company argues that in this case it never put its employees in a position that would meet the standard. The company argues that the letters which it wrote are well within the bounds of "free speech" and do not create the necessary element of compulsion nor do they in

any way make promises conditional on the outcome of the organizing attempt. It is the company's submission that the board should not accept the only evidence relating to a threat to job security before it; that is, Mr. Scott's evidence with respect to his private conversation with Mr. Russo on February 10th or 11th.

29. The company takes the position that it was entitled to meet with its supervisory staff in response to its knowledge of a union organizing campaign and that the only relevant considerations are those relating to actions it took vis-à-vis its employees. The company maintains that on the evidence it must be found that it was experiencing severe business problems relating to circulation and that the actions which it took were in response to these problems. The company argues that it was responding to these problems in advance of February 6th as evidenced by the fact that Mr. With was given extra help in November, that Mr. Thampe had hired additional DSR's in early January and was given approval to spend \$200 per week on part-time extra help in the third week in January, that Don Clement was committed to visit the branches to discuss credits and bonuses from January 30th and that Nick Russo was dealing with branch-related trucking problems prior to February 6th. The company maintains that Mr. Russo was aware well before the end of February that the circulation graph which it introduced was in error and that circulation was slipping. It is the company's position that it was responding to this critical problem both before and after February 6, 1981 as it should have done. The company does not accept that the elimination of its business problems eliminates the trade union or creates an unlawful interference with the trade union, and asks the Board to find that in acting as it did it did not violate the Act.

30. The union reiterated in reply that this is a case where the employer has used a carrot rather than a stick and in so doing has acted with the motive of defeating the trade union. The union argues that where the employer's motivation is anti-union (and in this regard we are asked to draw an inference from the timing of the employer's response) the actions which it takes are proscribed by the Act. In these circumstances the union argues that the company's reliance on its business problems does not assist it. The union asks the Board to contrast the company's approach pre and post February 6th and to pay special attention to the evidence of Mr. Russo that prior to the company's knowledge of union activity it was thought that the upcoming spring circulation drive would take care of its circulation problems. The union maintains that the company acted as it did to defeat the union and therefore, a violation of the Act must be found.

31. There are three preconditions which must be satisfied before section 8 of the act can be applied and certificate issued without a vote where, on the membership evidence, a union is not in a certifiable position or even in a vote position. An employer violation of the Act must be established. It must be established that as a result of the employer violation of the Act the true wishes of the employees cannot be ascertained and, finally, it must be established that the union enjoys employee support adequate for the purposes of collective bargaining.

32. There are a number of elements which go to make up the alleged company violation of the Act which is relied upon by the union in support of its application under section 8 of the Act. These are, firstly, the alleged intimidation and threatened discrimination against Mr. Scott and the probationary DSR's by Mr. Russo, secondly, the alleged undue influence exerted and promises made in the written correspondence to the DSR's from Mr. Marskell, thirdly, the alleged undue influence exerted by Messrs. Russo and Marskell in the field immediately following February 6, 1981, and finally, the alleged unlawful interference with

the union's right to organize and the employees' right to choose a bargaining agent in the form of the initiatives undertaken by the company immediately following February 6th which were ostensibly directed at its circulation difficulties. Considerable evidence with respect to the circulation of the statement in opposition to the applicant trade union was also led. We have reviewed this evidence in conjunction with the other evidence before us. Although the evidence relating to the circulation of the statement of desire may have caused the Board to find it not to have been a voluntary expression (on an application of the principles found in *Morgan Adhesives* [1975] OLRB Rep. Nov. 813) the issue of the voluntariness of the statement is not before us. The evidence before us with respect to the circulation of the statement of desire does not disclose any unlawful activity by the company.

33. Turning to the alleged intimidation and threatened discrimination against Mr. Scott and the probationary DSR's. Mr. Scott testified that on Tuesday, February 10th, during the course of a conversation with Mr. Russo at the East Branch office, he was shown a copy of "Canadian Business" and in particular, an article entitled "Friendly Firings" which he found to be intimidating. He testified that the next day, after the completion of his performance review, Mr. Russo asked him to go into a private office, asked him a number of questions concerning the extent of the union's organizing, and told him that he could break the back of the union by firing the 24 probationary DSR's and that he would not fire Mr. Scott but let him sit without promotion. Mr. Russo maintained that he showed Mr. Scott a different article than the one Mr. Scott identified and that he did so in response to Mr. Scott's concern for his job security and for the purpose of showing him how difficult it is to fire an employee. It is Mr. Russo's evidence that this conversation took place on Monday, February 9th and that the following day, after the completion of his performance appraisal, Mr. Scott asked to see him alone and identified himself as the individual behind the union organization. Mr. Russo denied that he made the remarks concerning probationary employees and the promotion opportunities of Mr. Scott, attributed to him by Mr. Scott. The issue is one which falls to be determined on a finding of credibility.

34. We must choose between the evidence of Mr. Scott and that of Mr. Russo. As in all cases where a finding of credibility must be made the Board considers the demeanor of the witnesses as they gave their evidence, weighs the evidence given against what best accords with reason and the objective facts, and finally, takes into account any inconsistencies or contradictions in the testimony of a witness which calls into question the accuracy or truthfulness of his testimony. The Board has put its mind to the conflict in the evidence given by Messrs. Scott and Russo with respect to what was said between them on or about February 10th and 11th and has resolved the conflict in favour of Mr. Russo.

35. There is no dispute on the evidence that on the morning of February 6th Mr. Scott called Mr. Raftus, the North Branch supervisor, in response to Mr. Raftus' invitation to Mr. Martin to have anyone interested in another point of view call him. Mr. Scott admitted that by making the call he was identifying himself as the union organizer. In our view, the fact that Mr. Scott would make the call on his own initiative casts a shadow over much of his evidence. The central thrust of his evidence relating to the conversation the previous day with Mr. Thampe was that he assumed a low profile while Mr. Martin "spewed forth". Mr. Scott denied that he had raised the subject of unionization or commented that "only a miracle can stop us." If Mr. Scott attempted to maintain a low profile, as he suggests, why would he publicly identify himself as the union organizer the next morning and consent to speak to the publisher of the newspaper? In the face of the union's failure to call either Mr. Martin or Mr. Farmer to

corroborate the evidence of Mr. Scott as it relates to the February 5th conversation which the three of them had with Mr. Thampe, and in the face of Mr. Scott's decision to identify himself to a manager of the company as the union organizer the very next morning, we are compelled to call into question the credibility of Mr. Scott by rejecting his testimony with respect to a matter which is central to the factual context of this case. Mr. Scott's decision to publicly identify himself as the union organizer on February 5th is consistent with Mr. Russo's evidence that on February 11th Mr. Scott identified himself as "the man you are looking for." Mr. Scott denied that he had made this statement. Notwithstanding the conflict in the evidence of Messrs. Russo and With with respect to whether Mr. Russo had been heard to say in the past "when in doubt throw them out", a conflict which we would resolve in favour of Mr. With, we must nevertheless find that we prefer the evidence of Mr. Russo to that of Mr. Scott with respect to the conversations which took place between the two on February 10th and 11th.

36. We are satisfied that Mr. Russo did not make the threatening remarks with respect to the continued employment of probationary DSR's or the promotion opportunities of Mr. Scott, attributed to him by Mr. Scott. With the exception of the magazine article which was shown to him by Mr. Russo, Mr. Scott, who, surprisingly, testified that he was easily intimidated by "higher-ups" in the company, testified in cross-examination that he had not been intimidated by anything else said to him by Mr. Russo or by what was said to him by Mr. Raftus or Mr. Thampe in the conversations which they had. We are satisfied that Mr. Russo, in showing Mr. Scott the magazine article which he says he did, did not attempt to, or did not in fact, intimidate Mr. Scott in violation of the Act. Having regard to all of the foregoing, we are satisfied that neither Mr. Russo nor any other member of management threatened or intimidated any of the company's employees in the period immediately following February 6, 1981.

37. We now turn to the conduct of Messrs. Marskell and Russo immediately following the company's knowledge of trade union activity and the initiatives undertaken by the company at this time which were ostensibly directed at its business difficulties.

38. Section 64 of the Act provides:

No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

39. A useful discussion of the purpose and application of section 64 (formerly section 56) of the Act is contained in *Skyline Hotels Limited* [1980] OLRB Rep. Dec. 1811. The Board commented as follows at pp. 1827-1828:

The striking aspect of this section is that on its face it makes no mention of anti-union motive or purpose. It simply uses the word "interfere", which, in normal parlance, could be taken to connote either intentional or unintentional conduct. As the Board commented in *Westinghouse*, [1980] OLRB Rep. April 577, at paragraph 54:

“... section 56 of the Act can be interpreted as prohibiting any employer action which has the effect of interfering with the representation of employees by a trade union regardless of whether or not an anti-union motive exists.”

It would not matter, in that event whether the employer could satisfy the Board of a legitimate business purpose for its conduct. But the Board has always had regard to industrial relations reality, and to the scheme of the Act as a whole, and has never interpreted the section in this manner. To do so would of course render meaningless the other specific provisions of the Act, such as section 58, which clearly require the finding of an anti-union motive. Any discharge of a union organizer, or perhaps of *any* employee during a campaign, for example, could be litigated successfully by a trade union under section 56, whether or not anti-union motive could be shown under section 58. It is impossible to contemplate that section 56 creates that kind of an unfair labour practice. As the Board commented in *Ontario Banknote Ltd.* (Board File No. 0590-80-U unreported):

5. The union's representative argued, notwithstanding the clear evidence [of anti-union motive] before the Board that, a discharge during a union campaign can have a chilling effect on the ability to organize. That is no doubt true. Other innocent factors, such as lay-offs for good business reasons or a financial downturn might also have a negative impact on the fortunes of a union. As real as those concerns may be to a union, they are not matters which the provisions of the Act are designed to protect unions or employees against. They should, therefore, not to be the basis of a complaint to this Board (*National Automatic Vending Co. Ltd.* 63 CLLC ¶16,278 at p. 1162).

See also *Walker Brothers Quarries Limited*, [1980] OLRB Rep. July 1107, at paragraph 16. In the absence of an anti-union motive in other words, it is not a violation of the section if the employer's conduct simply *affects* the trade union in pursuit of a unrelated business purpose. As the Board said in *A. A. S. Communications Ltd.*, [1976] OLRB Rep. Dec. 751, in commenting on this purposive meaning of the word “interfere”:

31. The essential element in any complaint under section 56 is employer interference with a trade union. A distinction must be made, however, between employer conduct that actually interferes with a trade union, and employer conduct that only *incidentally affects* a trade union. (emphasis added)

As has often been noted, however, the trade union will not in every case be required to prove by affirmative evidence the existence of an anti-union motive. This is so because the effect of certain types of conduct is so clearly foreseeable that an employer may be *presumed* to have intended the consequences of his acts: *A. A. S. Communications, supra*; *C. W.*

Martin Lumber, [1980] OLRB Rep. May 737; *Bank Canadian National* [1980] Can. LRBR 470; *Radio Officers' Union v. NLRB*, (1954) 33 LRRM 2417. Once such conduct has been established, then as a practical matter (and whether or not section 79(4a) of the Act applies to the situation) the onus is upon the employer to come forward with a credible business purpose to justify the conduct (cf. *NLRB v. Great Dane Trailers*, (1967) 65 LRRM 2465). It is up to the Board then, in all the circumstances to decide what the motive of the employer really was.

In order to succeed under section 64, therefore, the union must establish on the balance of probabilities that the actions complained of were motivated, in part at least, with the intention of interfering with its lawful activities. It is not sufficient that the union demonstrate that it has been adversely affected.

40. It should be observed at this juncture that this Board, with judicial approval, has held that if an employer's actions are motivated even in part by anti-union considerations the employer is in violation of the Act, notwithstanding the provisions of section 74 (formerly section 68) or coexisting legitimate business reasons. (See re *Westinghouse Canada Limited* [1980] OLRB Rep. Apr. 577, affd. by Divisional Court 80 CLLC ¶14,062.) The Board held in *Westinghouse* (at p. 605) as follows:

Section 68 of the Act does not support the adoption of a predominant motive approach to cases involving major business decisions as argued by the company. The unfair labour practice sections of the Act make it unlawful to discriminate against an employee in respect of his employment or opportunity for employment for anti-union reasons. We do not read section 68 as permitting the employer to act even in part on the basis of anti-union motives, which are clearly proscribed by the companion sections of the statute. (See *Academy of Medicine*, [1977] OLRB Rep. Dec. 793 at para. 36 and *Webster and Horsfall (Canada) Ltd.* ([1969] OLRB Rep. Sept. 780), at pages 784 and 785. When reference is had to sections 56, 58 and 61 of the Act, one must conclude that the "cause" referred to in section 68 of the Act is cause which is free from anti-union motive. The purpose of section 68 is to save the employee harmless from the effects of major business decisions which are free of anti-union motive. The section ensures that the mere impact of a bona fide business decision (a decision taken for "cause") cannot be used to infer an anti-union purpose or to support the foundation of a complaint under any other section of the Act.

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Against all of the foregoing we are not inclined to follow the approach of some American courts which have adopted the "predominant motive" approach to cases involving major business decisions which impact upon employee rights. In our opinion this approach would do violence to the protections afforded to employees under our Act and would create an indefensible distinction between anti-union employer decisions which affect one or two employees and those which may affect the whole work

force. This Board, with judicial support, has consistently found that management actions which may only be partially motivated by anti-union considerations are in violation of the Act. This test is the proper one to be applied in this case. This is not to say, however, that in shaping a remedy to unfair labour practices created by major business decisions the Board will not take co-existing and bona fide economic factors into account.

If it is established on the evidence that the employer's initiatives are motivated even in part by anti-union considerations, the employer will be found to be in violation of the Act. Although the co-existence of legitimate business reasons may be reflected in remedy they will not, for the reasons articulated in *Westinghouse*, exonerate the employer.

41. We are dealing with an allegation that the employer violated the Act by, in effect, soliciting grievances from bargaining unit employees and acting to rectify these grievances in response to and during the currency of the union's organizing campaign for the purpose of undermining the union's organizing efforts. In particular, the union alleges that the decision of the company to provide additional part-time adult help to the DSR's who required it, which had the effect of lessening the work load and reducing the hours of work, was designed to undermine the trade union. The Board's decisions are replete with cases of unlawful employer coercion and intimidation in the form of discharges, layoffs, changes in working conditions etc. and threats of same. It is not alleged in this case that this employer engaged in so stark an abuse of its authority. The allegation here is that the employer engaged in a more subtle but equally effective abuse of his authority; that he used a carrot rather than a stick. This Board has never had to deal with the issue of whether the solicitation of employee grievances and the conferring of benefits prior to the inception of the statutory freeze period, which is triggered by the notice of application for certification constitutes an unfair labour practice. The Board had, however, touched on the issue in two earlier cases.

42. In *Scythes & Company Limited*, 52 CLLC ¶ 17,018 this Board rejected as "a matter of conjecture" a submission made on behalf of a trade union applying for certification, that employees would be less likely to vote in favour of the applicant in a representation vote where the employer granted an unconditional retroactive wage increase immediately before the onset of the "silent period". The Board stated:

"As to the wage increase, it was granted without qualification when, for all the respondent knew, the employees were on the point of selecting the applicant as their bargaining agent. It was not a benefit conferred which was to be continued in effect or withdrawn depending on the outcome of the vote. The employees were not the less free to vote in favour of the applicant because they had received a wage increase."

However, in *Arnold Steel, General Contractor*, [1966] OLRB Rep. Oct. 510, the Board found that "the action of the employer of granting a wage increase . . . following the filing of [the] application [for certification] not only casts doubt in turn upon the petition but also . . . renders it most unlikely that the true wishes of the employees would be disclosed by a representation vote." In the recent *Ottawa General Hospital* decision, *supra*, the Board noted the apparent dichotomy between the two earlier Board decisions and commented that it found the rationale contained in the decision of the United States Supreme Court in *NLRB v. Exchange Parts Co.*, *supra*, to be persuasive.

43. In the *Exchange Parts Co.* judgment, the leading American authority on the subject, the United States Supreme Court upheld a decision of the National Labour Relations Board that the unconditional granting of certain benefits to employees, namely an additional statutory holiday, an improved overtime arrangement during holiday weeks and an improved vacation scheduling arrangement, prior to a representation election was in violation of section 8(a)(1) of the *National Labour Relations Act*. Section 8(a)(1) makes it an unfair labour practice for an employer to interfere with, restrain or coerce employees in the exercise of rights under that Act. In the *Exchange Parts* case, the benefits were put into effect unconditionally and on a permanent basis and there was no other interference with employee rights. The Court observed, in upholding the decision of the National Labour Relations Board:

The broad purpose of s. 8(a)(1) is to establish "the right of employees to organize for mutual aid without employer interference." *Republic Aviation Corp. v. Labour Board*, 324 U.S. 793, 798, 16 LRRM 620. We have no doubt that it prohibits not only intrusive threats and promises but also conduct immediately favourable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect . . . The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged. The danger may be diminished if, as in this case, the benefits are conferred permanently and unconditionally. But the absence of conditions or threats pertaining to the particular benefits conferred would be of controlling significance only if it could be presumed that no question of additional benefits or renegotiation of existing benefits would arise in the future; and, of course, no such presumption is tenable.

It is this reasoning which this Board found to be persuasive in the *Ottawa General Hospital* case, *supra*.

44. The U.S. Supreme Court ruled in *Exchange Parts, supra*, that the granting of benefits shortly before an election "with the intention of inducing the employees to vote against the union" (emphasis added) constituted a violation of s. 8(a)(1) of the *National Labour Relations Act*. Despite this requirement for proof of motive, the NLRB and the Courts have not hesitated to draw an inference of such unlawful motive where benefits are conferred during a union campaign or preceding a representation vote. In *NLRB v. Styletek, Division of Pandel-Bradford Inc.* (1975) 89 LRRM 3195, it was held that a *prima facie* violation is established where benefits are granted pending an election and the burden then shifts to the employer to explain. It is to be noted that even where a legitimate business justification or past practice exists, the timing of the granting or conferring of employee benefits must be explained. Timing has been treated as a separate issue from proof of a legitimate business purpose and the NLRB has held that the timing of an employer action, even in response to a legitimate business concern, may support an inference of unlawful motive. (See *J.C. Penny v. NLRB* (1967) 66 LRRM 2272, *NLRB v. Styletek, supra*, *NLRB v. Arrow Elastic Corp.* (1978) 98 LRRM 2004, *Schwab Foods Inc.* (1976) 92 LRRM 1285, and *Big G. Super Market* (1975) 90 LRRM 1333.)

45. The NLRB has held that even in the absence of an express promise of future benefits

the solicitation of employee grievances by the employer with an express or implied promise to remedy them during an ongoing campaign is a violation of s. 8(a)(1) of the *National Labour Relations Act*. In *NLRB v. Pur O Sil Inc.* (1974) 86 LRRM 1437, the Board stated:

We believe that where an employer, who has not previously had a practice of soliciting grievances or complaints, adopts such a course when a union engages in an organizational campaign and asks the employees to select a representative to meet with management, it implied to its employees that it will correct the inequities it discovers as a result of its inquiries, thus making union representation unnecessary. We conclude, therefore, that, by soliciting grievances and directing employees to select a representative to meet with management, respondent violated section 8(a)(1) of the Act.

Similarly in *York Division, Borg Warner Corp.* (1977) 95 LRRM 1283, the Board stated:

The Board has held that in the absence of an established program, the holding of meetings at which employees are encouraged to air their grievances or problems constitutes solicitation of those grievances and an implied promise of corrective action if employees will reject the union.

(See also *NLRB v. El Rancho Market* (1978) 104 LLRM 2612; *I.H. Communications*, 183 NLRB 1129 (1970), *Leland Stanford Jr. University* (1979) 101 LRRM 2212.)

46. Section 3(2)(c) of the *British Columbia Labour Code* provides:

No employer, and no person acting on behalf of an employer, shall

- (c) seek by intimidation, by dismissal, by threat of dismissal, or by any other kind of threat, or by the imposition of a penalty, or by a promise, or by a wage increase or by altering any other terms of employment, or by any other means, to compel or induce an employee to refrain from becoming, or continuing to be, a member or officer or representative of a trade-union.

In *re Tambllyn Drug Mart and Retail Clerks*, [1975] 3 Can. LRBR 336, the British Columbia Labour Relations Board was called upon to decide if the decision by the employer to implement the same wage increase for its employees as the union, which was then organizing, had won from its competitor, and to announce its intention to give further increments of the same size and on the same dates as those agreed to by the competitor, violated section 3(2)(c) of the B.C. code. The employer's policy had been to introduce wage increases once per year to reflect increases obtained by the union in negotiation with its competitor. The B.C. Board, in upholding the complaint in part, commented that the test to be applied where it is alleged that "employer activity (such as a wage increase or discipline) is an unfair labour practice because its true purpose and effect was to defeat a union drive (is) whether or not the activity complained of would have occurred in the absence of the organizing drive." The Board in that case found that the absence of any explanation by the company supported the inference that the organizational drive played a large part in the employer's decision and concluded:

Had the Employer merely implemented the first wage increase of the

Shoppers Agreement on July 1st, no objection could be taken. The Employer would only have been following its established policy of granting increases on July 1st and would at the same time have been remaining competitive with Shoppers. But the Employer went further than this. It abandoned its July 1st date for future increases, doubled the size of the increase it would grant and published this to all the employees in the midst of an organizing drive by the very union which had just bargained for those increases with Shoppers.

47. If the 1952 decision of this Board in *Scythes, supra* can be read as standing for the proposition that the granting of benefits to employees during the course of a union organizing campaign or before a representation vote is lawful, unless made conditional on the outcome of the vote, we decline to follow it. Having reviewed the jurisprudence which has developed under statutory language similar to section 64 of the *Ontario Labour Relations Act* and having considered the interpretation put on that language by this Board, that proposition is not tenable.

48. There is nothing in the Act which prohibits an employer whose employees are unorganized and who are not the subject of a union organizing campaign, from providing terms and conditions of employment which are designed to, and may have the effect of causing employees to turn their back on the option of collective bargaining. However, once a trade union begins to organize, it is protected by the provisions of section 64 of the Act and the employer is prohibited from acting with an intention to interfere with the selection of a trade union or the representation of his employees by a trade union. The section enshrines the employer's freedom to express his views but makes it an offence to use "coercion, intimidation, threats, promises or undue influence" as a means of thwarting the rights of the trade union and/or its employees. The granting of benefits or the solicitation of employee grievances during the course of a union organizing campaign if motivated even in part by a desire to undermine the trade union, breaches these prohibitions. Regardless of whether this type of activity is characterized as an attempt to threaten employees, as it has been by the United States Supreme Court in *Exchange Parts*, or as an attempt to make unlawful promises or as an attempt to unduly influence employees, it constitutes an unlawful interference with the trade union and with the right of employees to choose a trade union.

49. The threatening aspect of this type of employer conduct arises, in the words of the U.S. Supreme Court, because "employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and may dry up if it is not obliged." Employees may as easily infer from this type of employer conduct that the benefits conferred, which have not heretofore been enjoyed, will continue or that the grievances solicited, which have heretofore not been considered, will be addressed, if the union is defeated. When considered in this light the conferring of benefits or the solicitation of grievances during the course of a union organizing campaign may also be described as a form of promise that conditions will be maintained if the efforts being made by employees to form a trade union are discontinued.

50. The *Labour Relations Act*, in addition to prohibiting threats and promises designed to interfere with rights under the Act, makes it an offence for an employer to interfere with the representation of employees by a trade union by resort to "undue influence". The meaning of that term, as used in section 64 of the Act, is defined in *K-Mart Canada Limited*, [1981] OLRB Rep. Jan. 60 at p. 70 as follows:

In *Words and Phrases Legally Defined* (London, 1970) undue influence is defined in part as:

“The unconscientious use by one person of power possessed by him over another to induce the other to enter into a contract.”

In the context of *The Labour Relations Act* undue influence includes the unconscientious use by an employer of its power or authority over employees in order to induce them to forego their rights in relation to a union. An employer exerts undue influence on its employees, and thereby breaches the Act, when it takes unfair advantage of its position and authority in an attempt to sway the will of the employees. The line between legitimate employer expression and undue influence is not easy to draw in the abstract, and can only be assessed on a case by case basis.

The Board has long recognized the sensitive nature of the employer-employee relationship and the position of dominance enjoyed by the employer. The employer decides who will work and under what terms and conditions of employment. The employer is in a position to respond to employee concerns or to ignore them. The scheme of collective bargaining provided under the Act is designed to place employees on a more equal footing with their employer. If, when faced with a move by employees to avail themselves of collective bargaining, an employer uses his authority to confer benefits or to otherwise improve the terms and conditions of employment, and does so with a purpose of undermining the trade union, must it be found that the employer, given the extent of his authority within the employment relationship, has exercised undue influence? The answer, regardless of the coexistence of a business motive, is yes. An employer who takes advantage of and relies upon his control over the employment relationship in this manner unduly influences his employees in contravention of the Act.

51. We now turn to the facts before us in this matter. The company was made aware of the union organizing attempt on February 5th and a special meeting of all branch supervisors, attended by Mr. Russo, the Single Copy Manager and Mr. Marskell, the Circulation Manager, was called for the afternoon of February 6th. The purpose of the meeting was to advise the branch supervisors of their legal responsibilities during an organizing campaign and to determine why it was that the employees felt the need of a trade union. Mr. Marskell took the position that if the DSR's were looking to unionize, the branch supervisors had not been sensitive to the problems they were encountering in the field. The evidence establishes that conditions in the field had been deteriorating throughout the winter of 1980-81. Although the graph depicting the level of circulating did not show a decline, Mr. Russo testified that he knew that the graph was in error. Indeed, the number of papers returned, the number of customer complaints, the number of down routes, and the arrears in collection stood as evidence to management of the circulation difficulties which the company was encountering through January, 1981. Although some part-time adult help was being provided, and had been provided in the past, there had been no general canvass of the DSR's to discuss individual problems and to ascertain which individuals needed help. We are satisfied on the evidence that prior to February 6, 1981 the company had not established as a priority the solving of individual DSR circulation problems and had not undertaken to provide part-time help whenever it was needed. The assignment of Mr. Russo, a senior manager, and his interview with individual DSR's in the branches supports this conclusion. The evidence of Mr. Scott and

Ms. Swatuk is that many DSR's were working additional hours because they required extra help. Notwithstanding Mr. Russo's evidence in reply that the appropriate short-term solution to the company's circulation difficulties was the filling of the routes as quickly as possible by hiring outside persons, the company, rather than taking extraordinary measures in this regard, was intending, as Mr. Russo acknowledged in cross-examination, to recapture lost circulation with a spring promotion.

52. Following the February 6, 1981 branch supervisors' meeting, Messrs. Russo and Marskell visited branch offices. They had only infrequently visited the branch offices in the past. Mr. Marskell visited the Mississauga Branch on either Saturday, February 7th or Saturday February 14th (the evidence is unclear) and spoke with a number of DSR's. Mr. Russo was in the East Branch office on Saturday, February 7th, Monday, February 9th, and Tuesday February 10th. He visited the West Branch office on Thursday, February 12th and the Central Branch Office on Friday, February 13th. Mr. Russo interviewed individual DSR's in each of the branches and inquired of them with respect to their work-related problems and what could be done to remedy these problems. When Mr. Marskell visited the Mississauga branch he also inquired of the DSR's who were present what their work-related problems were and what could be done about them. Indeed, Mr. Marskell in the letter to DSR's dated February 12, 1981 invited DSR's to come forward with their problems. He stated:

A letter is an imperfect instrument to communicate my feelings about the way we work together and for me to understand your concerns about your career. If you would like to talk about it and problems that need resolving, give me a call.

It was suggested that extra help be provided and it is Ms. Swatuk's uncontradicted evidence that help was provided and continued until April. Additional part-time help was also provided in the East Branch after February 6th. Mr. Russo testified in cross-examination that at the February 6th supervisors' meeting, or shortly afterwards, \$2,000 to \$3,000 per month per branch was allocated for this purpose. He then testified in reply that these funds had been budgeted in October, 1980. However, regardless of when the funds were budgeted they were not being spent for this purpose prior to February 6, 1981. Mr. With testified that at the February 6th supervisors' meeting, branch supervisors were given a "blank cheque" to deal with the problems which had developed in the field. While his evidence in this regard may be an exaggeration, we are satisfied that resources which had heretofore not been used to provide part-time adult help for the DSR's were made available for this purpose from February 6th. In response to complaints voiced at the Mississauga Office to Mr. Marskell, office blinds, garbage cans, a bulletin board and business cards were supplied. Mr. Marskell also agreed to look into Mr. Barber's complaint with respect to his salary review. Mr. Russo arranged to have hockey tickets supplied to a DSR who had been promised them and he also arranged to have Mr. Scott's performance appraisal completed when Mr. Scott complained that it had not been done. These improvements, while not significant in themselves, demonstrate the preparedness of the company at the time to respond to employee problems generally.

53. In summary, there is no dispute that the company was beset by a host of difficulties relating to the circulation of its newspaper during the winter months of 1981. The company knew that it was confronted with these problems prior to February 6, 1981. However, prior to that date the company had made no attempt to solicit the opinions of individual DSR's or to

designate the short-term solution of these problems as an immediate priority. Subsequent to February 6th, the date upon which the company first learned of the union organizing attempt, the views of individual DSR's were solicited by the two senior managers of the Circulation Department; Mr. Nick Russo and Mr. John Marskell. A number of minor complaints were acted upon (blinds, garbage cans, business cards, bulletin board, hockey tickets) thereby clearly signalling the DSR's that the company was prepared to listen to and act upon their complaints. More importantly in contrast to the company's approach prior to February 6th, part-time adult help was provided on an across the board basis. The significance of providing part-time adult help on this basis in the context of the work setting cannot be over-estimated. Each DSR is responsible for the delivery of the newspapers within a district. Where carriers cannot be found for individual routes the DSR is required to deliver the papers himself. Even where a route is covered by a carrier the DSR is required to personally deliver the paper to customers who have been missed. The number of missed customers increases with an increase in carrier turnover. The DSR's are paid a fixed salary and not an hourly rate. In these circumstances the provision of part-time adult help to cover down routes directly affects the DSR's hours of work. The hours of work are reduced and hence the equivalent of the hourly rate is increased. The evidence is, and the company was aware, that hours of work was a major concern of the DSR's in the winter of 1981. The evidence establishes that upon learning of the union's organizing activity the two senior managers of the Circulation Department went into the field and solicited employee complaints, that these complaints were acted upon and that additional part-time help, which had the effect of reducing the hours of work of the DSR's was provided.

54. The company asks us to conclude that in doing what it did it was responding to its business problems as it was entitled to do. We have no doubt that the steps taken by the company were intended to and had the effect of addressing its circulation problem. However, given the company's knowledge of its circulation problems prior to February 6th and the nature of its response prior to that date, we are compelled to conclude, on the basis of both the timing and content of its response following its knowledge of trade union activity, that the company acted, at least in part, for the purpose of undermining the trade union and in so doing violated section 64 of the Act.

55. We now turn to a consideration of the company's written communication to the DSR's dated February 12 and 13, 1981. The unions asks the Board to apply the same test as that articulated by the Canada Board in *American Airlines and BRAC*, *supra*. After an extensive analysis of the jurisprudence under the *Canada Labour Code* and other Labour Relations statutes and a discussion relating to the responsive nature of the employer/employee relationship, the Canada Board concluded that under the *Canada Labour Code*.

The employer's right to communicate with its employees must be strictly limited to the conduct of its business. The employer is only permitted to respond to unequivocal and identifiable adversarial or libelous statements; by this we do not consider as being adversarial, the fact that an employee wishes or does not wish to join a trade union.

...employers' communications are to be permitted inasmuch as they relate to the efficient operation of the business. If they are not, then they must be viewed as a participation or interference in the representation of employees by a trade union and thus in contravention of s. 184(1)(a).

In coming to this conclusion, however, the Canada Board was careful to note that unlike the *Ontario Labour Relations Act*, the statute from which this Board takes its authority (and the *British Columbia Labour Code*), the right of the employer to communicate with his employees during an organizing campaign is not codified in the *Canada Labour Code*.

56. Section 64 of the *Ontario Labour Relations Act* provides that "... nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence." Even if so inclined, this Board could not impose the type of blanket restriction of employer expression imposed by the Canada Labour Board without doing violence to the Ontario statute. This Board must balance the right of employees to organize without being subjected to coercion, intimidation, threats, promises or undue influence and the right of an employer to express his views. In performing this balancing function, the Board has attempted to take a realistic view of the nature of the employment relationship and the type of inferences which are likely to be drawn by the average employee from words which have been spoken or written by his employer. The Board's approach is summarized in *Dylex Limited*, [1977] OLRB Rep. June 357 at pp. 366-67 as follows:

Counsel for the applicant took the position that an employer was required to stay neutral during the course of a union organizing campaign. We are of the view that no such requirement exists. Section 56 expressly states that nothing in the section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, threats, promises or undue influence. Where the difficulty inherently arises, however, is in trying to define the line at which an expression of views by an employer becomes "coercion, threats, promises or undue influence." In seeking to establish where the line lies the Board starts with the presumption that employees recognize that employers generally are not in favour of having to deal with employees through a trade union, and that therefore it ought not to surprise them when their employer indicates that he would prefer it if they voted against a trade union. Following from this the Board takes the view that an invitation to employees from their employer to vote against a trade union, in the absence of any surrounding facts or circumstances which would cause the employees to place undue emphasis on such statements, does not constitute undue influence within the meaning of section 56. (See *Playtex Limited*, [1972] OLRB Rep. Dec. 1027.) On the other hand, however, the Board is also cognizant that an employee may be peculiarly vulnerable to employer influences. This point is clearly brought out in the decision of the Canada Labour Relations Board in the *Taggart Service Limited* case [(1964) CLLR Transfer Binder '64-'66, ¶ 16,015 at page 13,055] the following excerpt from which was cited with approval by this Board in the leading case of *Bell & Howell Ltd.*, [1968] OLRB Rep. Oct. 695 at p. 706:

An employer may express his views and give facts in appropriate manner and circumstances on the issues involved in representation proceedings in so far as these directly affect him and has the right to make appropriate reply to propaganda directed against him in

relation thereto. However, he should bear in mind in so doing the force and weight which such expressions of views may have upon the minds of his employees and which derive from the nature and extent of his authority as employer over his employees with respect to their wages, working conditions and continuity of employment. He should take care that such expressions of views do not constitute and may not be reasonably construed by his employees to be an attempt by means of intimidation, threats, or other means of coercion to interfere with their freedom to join a trade union of their choice or to otherwise select a bargaining agent of their own choice.

(See also *Homeware Industries Ltd.* (1981) OLRB Rep. Feb. 165.)

In *Viceroy Construction Company Limited*, [1977] OLRB Rep Sept. 562, the Board found that repeated references to job security appearing in the employer's written communication to employees, coupled with the factual reference to a number of plant closings, constituted a veiled threat to employment security conditional on the decision of the employees to unionize. In *Greb Industries Limited* [1979] OLRB Rep. Feb. 89, employer communication which touched on job security, but was not otherwise dissimilar to that which is before us, was found to be within the bounds of employer freedom of expression (see also *Ottawa General Hospital*, *supra*).

57. We have examined the correspondence which is before us in this matter and other than for the express solicitation of employee grievances or problems, which we have considered as part of the company's broader response to its knowledge of trade union activity, we are satisfied that it is within the bounds of legitimate free expression. There is nothing in these letters which can be read as threatening; there is no reference to job security; there are no promises made conditional on the employee's decision with respect to the union. We do not consider the references to the launching of a training programme and the review of the four year DSR rate to constitute unlawful promises within the meaning of section 64 of the Act. The reference to the number of former DSR's who have made it to the management ranks is a factual statement which, in our view, would not impair employee freedom of choice. The letter of February 13th contains a number of factual statements as attested to by the union's response of February 19, 1981. None of these statements can be read as constituting an implied or veiled threat to job security or the making of a promise conditional on the outcome of the union's organizing efforts. These statements, taken individually or together, do not exceed the bounds of the employer's right to express himself.

58. We reiterate that other than for the open solicitation of employee grievances, which we have dealt with as part of the employer's broader response to union activity, the letters which it sent to the employees on February 12th and 13th are within the bounds of the employer's freedom of expression protected by the statute.

59. We have found that the company violated the Act when it solicited employee grievances and provided additional adult help in response to and for the purpose of interfering with the union's organizing campaign. We must now decide if this case calls for the application of section 8 of the Act. As is clear on the face of the section, automatic certification is not the statutory response to every employer violation of the Act committed during a union organizing campaign. The purpose of the section with its built-in restrictions is summarized in *Ex-Cell-O Wildex, Canada*, [1977] OLRB Rep. June 370 at p. 373 as follows:

Section 7a (now section 8) allows the Board to certify a trade union as bargaining agent without the membership percentage usually required for outright certificate. It is not surprising, then, that the Legislature has placed a number of legal restrictions on its use. As the wording of the section makes clear, it is not enough that the employer has engaged in conduct prohibited by *The Labour Relations Act*. This conduct must have resulted in a situation where the true wishes of the employees are not likely to be ascertained from the results of a representation vote. As well, the trade union must, in the opinion of the Board, have membership support adequate for the purposes of collective bargaining in the union found appropriate by the Board.

The logic of these requirements is clear enough. The premise of the Act's certification procedures is that collective bargaining is to be afforded only when it is the choice of the majority. Accordingly, the grant of automatic certification to a trade union, in the absence of documented evidence of majority support, should only be permitted where the true wishes of the employees are not likely to be ascertained through the normal procedures and where the union has sufficient support among the employees in the unit to bargain collectively with the employer.

The Board expanded its views in this regard in *Radio Shack* [1979] OLRB Rep. Mar. 248 at p. 256 as follows:

Certification under section 7a [now section 8] of the Act is an extraordinary process which is not applied by the Board in response to all employer violations of the Act during the course of a union's organizing campaign. The Board is given broad remedial authority to rectify breaches of the Act and accepts that in most situations employees feel protected by the rule of law established under the Act so that they are not unduly influenced when making a secret ballot choice by employer violations of the Act which do not constitute direct threats to the employees' job security or promise of general economic advantage dependent upon whether or not a union is certified. Notwithstanding the absence of this type of violation in the instant case, the Board is satisfied that the employees of the respondent could not feel protected by the rule of law and confident in the efficacy of the protections afforded under the Act such that their true wishes would likely be ascertained by the taking of a secret ballot representation vote.

Notwithstanding proven employer violations of the Act, the Board has declined to apply section 8 in a number of cases. These cases are reviewed in *Upper Canadian Furniture, supra*.

60. The Board has found in a number of cases that the employer, in violating the Act, made threats to the continued job security of his employees conditional on whether the union succeeded in its attempt to become certified. In these cases, the Board concluded that the employer violation of the Act was such as to make it unlikely that the true wishes of the employees could be ascertained. An employee is unable to express his true wishes where he has been told by his employer, either expressly or impliedly, and has reason to believe, that the

selection of a union may cause the company to reduce the scale of its operation or close down with an attendant reduction in the number of jobs. (See *Dylex Limited, supra, Lorain Products (Canada) Ltd.* [1977] OLRB Rep. Nov. 734, *Riverdale Frozen Foods Limited*, [1979] OLRB Rep. April 338, *Straton Knitting Mills Limited* [1979] OLRB Rep. Aug. 801, *Sommerville Belkin Industries Limited*, [1980] OLRB Rep. May 791 and *A. Stork and Sons Ltd.*, [1981] OLRB Rep. April 419.)

61. The Board has also applied the section where the cumulative effect of a range of unlawful employer activities, none of which taken separately might call the section into play, has the effect of undermining the confidence in the rule of law which a reasonable employee is presumed to have and which gives a reasonable employee the confidence to make a free choice. In these circumstances the Board is forced to the inevitable conclusion that the true wishes of the employees are not likely to be ascertained. (See re *Radio Shack, supra, K-Mart, supra, Skyline Hotels Limited, supra* and *Robin Hood Multi Foods* [1981] OLRB Rep. July 972.)

62. This is not a case where the employer has threatened the job security of his employees should they decide to join a trade union and bargain collectively, nor is it a case where the employer has engaged in a pattern of misconduct which would undermine the confidence of his employees in the viability of the Act and the protections afforded them in the exercise of their rights under the Act. The Board must nevertheless put its mind to whether or not the specific violation of the Act which has been found in this case has made it unlikely that the true wishes of the employees can now be ascertained. This determination, apart altogether from whether the union enjoys support adequate for collective bargaining, must be made, not only in light of the nature of the violation, but also in light of whatever other remedial responses are available to the Board and the effectiveness of these responses in redressing the impact of the unfair labour practice. Clearly, if alternative remedial responses provide an atmosphere conducive of free expression, the Board ought not to apply the extraordinary statutory remedy of certification without evidence of the membership support normally required for certification.

63. Before turning our mind to the question of remedy, we are compelled to observe that the union in this case did not approach over 80 per cent of those in the bargaining unit. The union had not recommenced its general canvass of bargaining unit employees prior to the company's unfair labour practice and in response, decided not to pursue its organizing plans but to apply to the Board under Section 8 of the Act. This is not a case, therefore, where it can easily be concluded that the membership support evidenced by the union, although less than the statutory minimum, is but a part of its real support, thereby lending substance to a finding that the union enjoys support adequate for the purposes of collective bargaining. In the circumstances of this case, and in the face of the actual membership support evidenced, the issue as to whether the union enjoys support adequate for collective bargaining is at best problematic.

64. The Board has a broad remedial power under section 89(4) of the Act and has increasingly, with judicial approval, used this authority to shape far-reaching and effective remedies to unfair labour practices. (See re *Radio Shack* [1979] OLRB Rep. Dec. 1220, *Fotomat* [1980] OLRB Rep. Oct. 1397, *Westinghouse Canada Limited* [1980] OLRB Rep. Apr. 577, aff'd Supreme Court of Ontario (Divisional Court) 80 CLLC 14,062.) The principles which underline the framing of effective labour board remedies are analyzed in *Radio Shack*, [1979] OLRB Rep. Dec. 1220. This Board attempts to provide remedies to

unfair labour practices which, although not punitive, are fair in the sense that they are fully compensatory and, as far as possible, put the successful complainant in the position he would have been in had there been no violation of the Act. In order to achieve the desired remedial result the Board must be sensitive to the realities of the work place so that a correct assessment of the impact of the unfair labour practice is made. The effect of a miscalculation, in terms of both the fairness and the effectiveness of the remedy, is self-evident. These are difficult determinations which tax the special expertise of the Board to the full.

65. This is not a case which lends itself to a Board order to revert to the *status quo ante*. In the first place the effect of such an order would be to deprive the employees of the benefits conferred. As importantly, the effect of such an order would be to interfere with the legitimate business operations of the respondent. We are satisfied that this is a case of mixed motive. The company's response to its knowledge of trade union activity was motivated not only by a desire to undermine the trade union but also by a desire to redress its circulation problems. In these circumstances, and where, in the Board view, a combination of other remedies can redress the effect of the unfair labour practice, an order of this type is inappropriate.

66. The effect of the company's unfair labour practice is twofold. Firstly, individual employees may have been influenced with respect to the need for a trade union. The fact that the bulk of the bargaining unit employees were never approached to sign cards does not alter our conclusion in this regard. Secondly, the union has lost the vehicle through which it planned to approach and persuade the unsigned DSR's. The evidence is that following the company's unlawful activity the employees who had indicated a willingness to approach their fellow employees on behalf of the union lost their enthusiasm and were no longer prepared to play a liaison role. We are satisfied that this was as a result of the company's unfair labour practice.

67. Given the nature of the violation in this case and its effect, we are of the view that a remedy which requires the company to post notices which inform the bargaining unit employees that the Board has found the employer in violation of the Act and which contain a statement of the employees' rights under the Act, coupled with an order providing the union with an opportunity to address the affected employees will redress the effect of the employer's actions such that the union will be made whole and the true wishes of the employees can be ascertained. The provision for union access to employees will allow it to attempt to persuade employees of the need for collective bargaining. In addition, the union will have the opportunity to explain to those in the bargaining unit that the benefits which they have received are at least partially the result of the union's presence and furthermore, are subject to whatever unilateral decision the company may make with respect to how it operates in the future. It is our view that in the circumstances of this case, employees so informed will be able to make a voluntary decision as to whether or not to give the complainant union the support necessary to produce effective collective bargaining.

68. Having regard to all of the foregoing,

- (i) We hereby declare that the respondent company violated section 64 of the Act when, from February 6, 1981 and following, it solicited employee grievances and provided its district sales representatives with additional part-time adult help in part for the purpose of interfering with the attempt of the complainant trade union to organize its district sales representatives.

- (ii) We hereby direct that the notice, marked 'Appendix' to this decision, be posted in a conspicuous place in each of the branch offices for a period of not less than 60 consecutive working days from the date of this decision.
- (iii) We hereby direct that a representative of the complainant trade union be given the opportunity to address the district sales representatives in each branch office during working hours on one occasion. Each such address is not to exceed one hour, is to commence after 10:00 a.m. and is to take place within 90 days of the date of this decision. The complainant will notify the respondent one week in advance of the date and time of each address.

69. The application for certification is hereby dismissed.

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH THE UNION PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY SOLICITING EMPLOYEE GRIEVANCES AND CONFERRING CERTAIN BENEFITS UPON EMPLOYEES IN CONTRAVENTION OF SECTION 64 OF THE ACT.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

THE GLOBE AND MAIL DIVISION OF
CANADIAN NEWSPAPERS COMPANY
LIMITED

PER: (AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

0686-81-JD Harold R. Stark Company Limited, Complainant, v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 463, Labourers' International Union of North America, Local 597, Labourers' International Union of North America, Ontario Provincial District Council, A Council of Trade Unions for Teamsters Local 230, and Labourers' Union, Local 597, Respondents, v. Oshawa Paving Ltd., Oshawa Area Signatory Contractors, Interveners.

Jurisdictional Dispute – Dispute as to work involving installation of storm-catch basins between Plumbers' and Labourers' unions – General contractor sub-contracting work in dispute – Sub-contractor using labourers to do work – Whether attempt to enforce sub-contracting clause sufficient to trigger jurisdictional dispute – Board raising parties' concerns about dealing with jurisdictional issues at arbitration

BEFORE: Ian Springate, Vice-Chairman, and Board Members J. Wilson and C.A. Ballentine.

APPEARANCES: *G. Grossman and W.C. Stark for the complainant; L. C. Arnold and Chris Burrows for the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 463; A. M. Minsky, W. Fair-service and T. Connolly for Labourers' International Union of North America, Local 597, Labourers' International Union of North America, Ontario Provincial District Council, A Council of Trade Unions for Teamsters Local 230, and Labourers' Union, Local 597; Bruce Binning for the interveners.*

DECISION OF IAN SPRINGATE, VICE-CHAIRMAN, AND BOARD MEMBER C. A. BALLENTINE; February 8, 1982

1. This is a complaint under section 91 of the *Labour Relations Act* in which the complainant Harold R. Stark Company Limited ("Stark") has requested that the Board issue a direction with respect to the assignment of certain work. Stark is supported in its request by Oshawa Paving Ltd. ("Oshawa Paving") as well as by the Labourers' International Union of North America, Local 597 ("Labourers' Local 597") and two councils of trade unions to which Labourers' Local 597 belongs. On the other hand, it is the position of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 463 ("U.A. Local 463") that the events leading up to the filing of the complaint are not the proper subject matter of a section 91 complaint.

2. The job in question is at the General Motors' plant in the City of Oshawa. Milne and Nicholls Limited is the general contractor on the job. Milne and Nicholls has sublet a wide range of work to Stark. Stark is a mechanical contractor bound to both the U.A. and the Labourers' provincial agreements.

3. Part of the work sublet to Stark involves work on a parking lot. Start has re-sublet all of the parking lot work to Oshawa Paving. Oshawa Paving is bound by a collective agreement with a council of unions comprised of Labourers' Local 597 and Teamsters' Local No. 230. Oshawa Paving has no contractual relations with U.A. Local 463.

4. U.A. Local 463 apparently takes no issue with respect to most of the work which has been sublet by Stark to Oshawa Paving, but has complained about that portion of the work which involves the installation of parking lot storm-catch basins and their connection to an existing storm sewer. Oshawa Paving has assigned the work in question to persons in its employ who are members of Labourers' Local 597. U.A. Local 463 takes the position that its members should be performing the work.

5. On or about May 5, 1981, Mr. C. Burrows, business agent for U.A. Local 463, telephoned Mr. W. Stark, a representative of Stark. Mr. Burrows indicated that he felt members of U.A. Local 463 should be doing the work on the catch basins, and further that Stark should take back the work in question. Almost all of Stark's employees are members of the U.A., with the company employing only a few labourers. Accordingly, it was understood by both Mr. Burrows and Mr. Stark that if Stark did the work with its own forces, it would use members of U.A. Local 463. Stark did not take back the work.

6. U.A. Local 463 made no request of Oshawa Paving that it employ members of Local 463. Indeed, Mr. Burrows refused Mr. Stark's request that he talk to representatives of Oshawa Paving. U.A. Local 463 also did not try to get Stark to request that Oshawa Paving employ members of U.A. Local 463. It is clear that U.A. Local 463 wanted to have its members do the work in the employ of Stark and that at no time did it seek to have Oshawa Paving assign the work to its members.

7. As indicated earlier, Stark and U.A. Local 463 are bound by the terms of a provincial agreement. The agreement in question was actually entered into by the Mechanical Contractors Association Ontario, and the U.A.'s Ontario Pipe Trades Council. Article 11 of this agreement provides as follows:

"Recognizing that the Contractor can sub-contract, no Contractor shall directly or indirectly sublet or sub-contract or otherwise transfer to any employee or any other employer not signatory to a U.A. agreement any of the work coming under the jurisdiction of this agreement."

It should be noted that the Labourers' provincial agreement to which Stark is also bound, contains a somewhat similar provision.

8. On May 14, 1981, U.A. Local 463 filed a grievance against Stark alleging that it had violated Article 11 of its provincial agreement by subletting the work in dispute to Oshawa Paving, a company not signatory to or otherwise bound by a U.A. agreement. The grievance asked that Stark be required to rescind its subcontract to Oshawa Paving, and further, that Stark reimburse U.A. Local 463 and its members for the money they would have received had the work not been sublet to Oshawa Paving. On June 1, 1981, the grievance was referred to the Board for a determination pursuant to section 124 of the Act. (See File No. 0473-81-M.) The 124 referral has been adjourned to allow these proceedings to be dealt with first.

9. It is the contention of Stark, Oshawa Paving and Labourers' Local 597 that U.A. Local 463's request for the work from Stark triggered a jurisdictional dispute between the two unions which can be dealt with by way of a section 91 complaint. U.A. Local 463 admits that there are "jurisdictional overtones" to this matter, but contends that section 91 is not wide enough to encompass the fact situation present here. The relevant portion of section 91 is subsection 1 which provides as follows:

“The Board may inquire into a complaint that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trade unions, was or is requiring an employer or an employer’s organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class, or that an employer was or is assigning work to persons in a particular trade union rather than to persons in another trade union, and it shall direct what action, if any, the employer, the employers’ organization, the trade union or the council of trade unions or any officer, official or agent of any of them or any person shall do or refrain from doing with respect to the assignment of work.”

10. The wording of section 91(1) makes it clear that for this to be a proper proceeding under section 91, U.A. Local 463’s approach to Stark, and/or its grievance filed against Stark, must constitute a request of an employer by a trade union that work be assigned to its members and not members of another union. The work, however, was actually assigned to the employees who did the work by Oshawa Paving and, accordingly, it would appear that the term “employer” as it is used in section 91(1) refers to Oshawa Paving rather than Stark. As noted above, U.A. Local 463 did not request that Oshawa Paving assign the work to its members. It was contended at the hearing that Stark’s subcontracting out of the work to Oshawa Paving amounted to an assignment of work by Stark to members of Labourers’ Local 597 and that accordingly Stark should be regarded as the “employer” for the purposes of section 91(1). The Board considered such an approach in the *Napev Construction Ltd.* case, [1980] OLRB Rep. Feb. 247, but concluded that such an approach could not be justified. In reaching this conclusion, the Board engaged in an extensive review of the legal precedent underlying section 91(1). It is worthwhile to refer to part of that review:

“11. Until 1960, no particular machinery existed in Ontario to settle jurisdictional disputes in the construction industry. This situation proved unsatisfactory and following a long study and publication of the *Report of the Select Committee on Labour Relations* (1958). The *Labour Relations Act* was amended in 1960 by enacting the then sections 66 and 76. Section 76 empowered the Lieutenant Governor-in-Council to appoint one or more jurisdictional disputes commissions each composed of one or more persons. Section 66(1) read as follows:

‘66(1). Upon complaint to the Board that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trade unions, was or is requiring an employer or an employers’ organization to assign particular work to employees in a particular trade union or in a particular trade, craft or class rather than to employees in another trade union or in another trade, craft or class, or that an employer was or is assigning particular work to employees in a particular trade union rather than to employees in another trade union, a jurisdictional dispute commission may, after consulting any person, employers’ organization, trade union or council of trade unions that in its opinion may be affected by the complaint, make such interim order with respect to the assignment

of the work as it in its discretion deems proper in the circumstances, and the employer, employers' organization, trade union, council of trade unions and the officers, officials or agents of any of them shall comply with the interim order.'

12. It is apparent from this wording that the provision, as originally drafted, was aimed at on-site jurisdictional conflict disrupting or having the potential to disrupt a work assignment made by an 'employer' to his 'employees'. In fact, it was the very strict legal interpretation holding that the 'requiring' trade union had to be claiming the work on behalf of current or existing employees of the employer that caused havoc in the application of the section and eventually gave rise to an amendment substituting the now existing term 'persons' for 'employees'. This decision was rendered in *Regina v. Orliffe Ex parte Can. Pittsburgh Ind. Ltd.*, [1961] O.W.N. 223 by Chief Justice McRuer. The case dealt with an allegation that certain work being done under the applicant's collective agreement with the chemical workers union and the painters union belonged to the bridge workers union under an agreement between the painters union and the bridge union. This work, it was alleged, should have been done by composite crews of bridge workers and members of the carpenters union, but the applicant had no employees who were members of either of these latter two unions. The Chief Justice held that by using the word employees the section contemplated only those disputes that arise with respect to the assignment of work by an employer among those that are actively engaged in the work over which he has direction. While this restrictive interpretation of the word employee might not be given if the same application were brought today (See *Blouin Drywall Contractors Ltd.* (1975), 75 CLLC ¶14,295) there can be little doubt that the section, as initially drafted, was addressing itself to direct work assignments from employers to persons who were or who would become employees and not to contractual relations between general contractors and their subcontractors (See also, to the same effect, *Regina v. Jurisdictional Disputes Commission, Ex parte Wood, Wire & Metal Lathers' International Union*, [1963] 2. O.R. 698; *Regina v. Ontario Labour Relations Board, Ex parte Bennett & Wright Ltd.*, [1968] 2. O.R. 168; *Regina v. Ontario Labour Relations Board, Ex parte International Association of Bridge, Structural & Ornamental Ironworkers, Local 736*, [1969] 1 O.R. 405; the latter case making it clear that the subsection nowhere limits its applicability to disputes between unions having collective bargaining rights and the employer involved). This situation was reviewed by the Goldenberg Commission appointed in 1961 to inquire into labour-management relations in the construction industry and at page 53 of the Commission's 1962 report it was recommended 'that the word persons be substituted for the word employees in section 61(1)... so that a jurisdictional disputes commission may have jurisdiction to receive complaints from unions whether or not they have members in the employ of the employer or employers' organization concerned.'

13. While this recommendation was not immediately acted upon by the Legislature, see *The Labour Relations Amendment Act, 1970* (No. 2), S.O. 1970, c.85, s.30, many other of the Commission's important recommendations were and, in 1966, the Act was further amended to give the Ontario Labour Relations Board direct responsibility for exercising all the powers previously held by the special commission. However, for the purposes of this complaint, it is crucial to note that no amendment was made to the word employer and litigation over its meaning in relation to the interaction between trade unions and general contractors has remained unaffected."

11. The Board in the *Napev* case, then went on to review the Board's jurisprudence in interpreting what is now section 91(1). This review indicated that the Board has in a large number of cases concluded that the section is directed at situations where a union seeks to have work assigned to its members by the employer actually responsible for performing it, and that the filing of a grievance alleging a violation of a subcontract clause is not, by itself, sufficient to bring a dispute within section 91. Of particular interest in this regard is the reasoning of the Board in the *Ellis Don Limited* case, [1972] OLRB Rep. Mar. 215. In that case a general contractor had subcontracted work to a subcontractor having a collective bargaining relationship with the Lathers' union. The Carpenters' union filed a grievance against the general contractor contending that the subcontractor was in violation of the general contractor's collective agreement with the Carpenters' union. The general contractor then filed a complaint under what is now section 91. Before the Board, the Carpenters' union contended that the matter was not the proper subject matter of a complaint, in that the general contractor was not the employer who had made the work assignment. The Board accepted this position and dismissed the complaint with the following reasoning:

"11. We note that unlike section 123 [now section 135] of the Act, subsection (1) of section 81 does not specifically provide that the Board may inquire into a complaint 'of an interested party'. Be that as it may, let us assume for purposes of argument, but without so finding, that *Ellis Don Limited* is a party which can make the instant complaint. Based on the evidence before us, only *Acme* qualifies as 'an employer' within the meaning of the said subsection since it is the employer who assigned the work which is the subject-matter of the complaint. *Acme*, however, was not required by a trade union to assign particular work to persons in a particular trade union rather than to persons in another trade union and did not of its own initiative assign particular work to persons in a particular trade union rather than to persons in another trade union. More specifically, *Acme* assigned the work involved in the installation of drywall systems and direct-hung grid ceiling systems on the *Thompson Building* to persons in its employ who are lathers. But *Acme* cannot be said to have assigned the work to lathers rather than carpenters since the respondent carpenters at no time advised *Acme* that they claimed jurisdiction over the said work and in no manner sought to require *Acme* to assign the work to members of their craft. Moreover, the complainant, *Ellis Don Limited*, at no time and in no manner sought to require *Acme* to assign the said work to carpenters rather than lathers. This being so, in fact, there is no work assignment dispute within the meaning of sub-

section (1) of section 81 of the Act. The Board therefore is without jurisdiction to entertain the instant complaint.”

12. In the instant proceedings it was contended that the *Napev* case, and earlier decisions of the Board should not be followed in that here there exists a unique fact situation, namely, that U.A. Local 463 sought to have Stark revoke its subcontract to Oshawa Paving and then directly assign the work to members of U.A. Local 463. On this basis, it is contended that Stark qualifies as an “employer” for the purposes of section 91(1). We are unable to accept this as a material distinction from the earlier cases. Although U.A. Local 463 did indicate its desire that Stark become the employer of those performing the work, as opposed to re-subletting the work to a more acceptable subcontractor, in fact Stark never did become the employer. The individuals actually performing the work have at all times been employees of Oshawa Paving who were assigned to the work by Oshawa Paving. Accordingly, in our view, the reasoning in the *Napev* and other cases referred to above does have application to the situation before us.

13. It was strongly contended by counsel for Stark, Oshawa Paving and Labourers’ Local 597 that it was Stark through its choice of subcontractor which in fact determined which unions’ members would perform the work, and that accordingly, in this case, the Board should not follow the earlier cases but instead take a more “realistic” view of the matter and treat Stark as the employer for the purposes of section 91(1). There is no question but that Stark could have performed the work itself using members of U.A. Local 463. Equally, Stark could have subcontracted the work to a mechanical firm which uses U.A. members to perform this type of work. As it turned out, Stark subcontracted the work to a firm which employed members of the Labourers’ union to perform it. In these circumstances, we agree with the contention that Stark, through its choice of subcontractor, or decision to do the work itself, could have determined which unions’ members would have been assigned the work in question. This being so, we acknowledge that an argument exists as to why the Board should have the jurisdiction to deal with disputes over work allocation which arise in the context of subcontracting arrangements and the enforcement of subcontracting provisions in collective agreements. Indeed, on the basis of the control exercised by a contractor over a subcontractor, the National Labour Relations Board has assumed the jurisdiction to make jurisdictional determinations in such circumstances. See: *General Motors Corporation* 99 LRRM 1609. In Ontario, however, given the language of section 91(1), its legislative history and the interpretation given to the section over the years, we are satisfied that the section, as it is currently worded, does not cover the type of situation now before us, and that any possible widening of the scope of the section is a matter for the Legislature to deal with.

14. Counsel for Labourers’ Local 597 contended that the Board’s reasoning in the *Pre-Con Company* case, [1981] OLRB Rep. July 947, which has issued subsequent to the release of the *Napev* decision, supported the contention that the type of situation before us could be dealt with by way of a section 91 complaint. In *Pre-Con*, a general contractor let certain work, including some caulking work, to the Pre-Con Company. The Carpenters’ union then filed a grievance against the general contractor alleging a breach of a subcontracting provision in their collective agreement. The general contractor was also bound to a collective agreement with the Labourers’ union containing a similar subcontracting provision. Subsequent to the filing of the grievance, the general contractor directed Pre-Con to employ carpenters to do the caulking work. In its decision, the Board concluded that the facts before it justified a conclusion that the general contractor had acted as the agent for the Carpenters’ union in

requiring that Pre-Con assign the work to carpenters instead of to labourers. We have no difficulty with this type of reasoning. The Board has long recognized that a union can make a demand for an assignment of work from an employer through an agent, and that a general contractor is frequently employed as such an agent. See: *Beer Precast Concrete Limited*, [1969] OLRB Rep. Jan. 1108. In the instant case, however, U.A. Local 463 did not use Stark as its agent to try to get Oshawa Paving to employ members of the local and, further, Stark on its motion appears not to have approached Oshawa Paving with such a request.

15. In the *Pre-Con* case, the Board also made reference to the fact that the general contractor was bound to two collective agreements containing conflicting provisions regarding the subcontracting of the work in issue. The Board then went on to make the following comment:

“20. Of particular concern in the present dispute is the matter of conflicting provincial collective agreements binding upon a general contractor. We are of the view that where the contractor is bound by such completely conflicting collective agreement, and an attempt is made to enforce those agreements, that that is *prima facie* a jurisdictional dispute. This is particularly so in the present case where the general contractor bound by such conflicting provincial agreements puts pressure on the subcontractor actually employing the men. We are prepared to view that as ‘requiring’ the subcontractor within the meaning of section 81(1). Not only are we satisfied that the Board has the jurisdiction to entertain such complaints under section 81, but such a procedure affords all of the affected parties an opportunity to protect their interests, and section 81 gives the Board the broad powers to develop an appropriate labour relations remedy.”

In view of the Board's conclusion that the Carpenters' union had used the general contractor as its agent to require that Pre-Con assign the work to carpenters rather than to labourers, this comment was unnecessary to the result. Further, the comment was made in the context of, and referred to, a general contractor putting pressure on the subcontractor actually employing the men doing the work, which is not the situation before us. Given the specific context in which the statement was made, we doubt whether the Board in the *Pre-Con* case meant to indicate that in every case where an attempt is made to enforce a subcontracting provision which conflicts with a similar provision contained in another relevant collective agreement, section 91(1) automatically becomes applicable. Indeed, in our view, the wording of section 91(1) simply does not support such a general conclusion.

16. In their submissions, the parties, other than U.A. Local 463, clearly indicated their concern that if this matter could not be dealt with under section 91, then it would be dealt with in a section 124 arbitration proceeding where the root jurisdictional issues would not likely be fully addressed. This is an understandable concern. However, such a concern cannot be a basis for giving section 91(1) a meaning not contemplated by the statute. It may be that the concerns expressed about having what is essentially a jurisdictional matter dealt with at arbitration can in fact be dealt with in the context of the Board fashioning a remedy in the section 124 arbitration proceeding, assuming, of course, that a violation of the subcontracting provision in the applicable collective agreement is made out. Can it be said, for example, that a construction trade union has properly sought to mitigate the damages in circumstances where

it is alleging a violation of a subcontracting provision, but at the same time has refrained from seeking an assignment of the work from the employer actually responsible for assigning it. Similarly, it may be open to question as to whether in a section 124 proceeding any order should go requiring an employer to cease subletting certain work to a firm employing members of one union, and requiring him to do it himself or have it done by another contractor using members of the grieving union, in circumstances where although the matter arises out of a jurisdictional dispute the grieving union has not brought the matter within the provisions of section 91 so as to allow the jurisdictional issues to be properly canvassed and ruled upon. This is particularly so in light of the fact that the subcontractor and the union whose members are actually performing the work will likely not have standing to participate in the section 124 arbitration proceedings. We raise these issues only as matters which perhaps should be addressed at a later time, and reach no conclusions with respect to them.

17. Having regard to our conclusion that the subject matter of this complaint does not come within the provisions of section 91, these proceedings are hereby terminated.

DECISION OF BOARD MEMBER J. WILSON;

1. I cannot agree with the majority decision that this is not a valid jurisdictional dispute.

2. Concern is expressed that section 91 is directed at employers actually responsible for performing the work. Here, Stark was responsible for having the work performed — by a contractual obligation. He had the option of performing the work in dispute with his own forces or of subcontracting it to another company.

3. Stark is an experienced mechanical contractor of many years standing in the Oshawa area. It would be naive to suppose that in letting a subcontract to Oshawa Paving that he was not fully aware that the work in dispute would be performed by labourers. In consequence, when Stark sublet the work he must have made a conscious, knowledgeable decision that such work should be performed by labourers. This is borne out further by Stark's statement in the complaint that similar work on the same site had previously been subcontracted to, and completed by, Oshawa Paving (and apparently not challenged).

4. United Association Local Union 463 obviously takes a different view.

5. However, in view of Stark's actions, several questions can be raised: Is the work within the trade jurisdiction claimed by the United Association? Or is it within the trade jurisdiction claimed by the Labourers? Do both trades have jurisdiction over parts of the work? Has the work previously been abandoned by the United Association? Is a composite or joint crew a feasible answer to the problem?

6. Since the work in dispute, by agreement, involves the installation in a parking lot of catch basins and sewer lines to connect to an existing storm sewer, rather than plumbing drains within a building, these questions are extremely pertinent.

7. The United Association Local Union 463 has taken the approach of filing a grievance under section 124 alleging a violation by Stark of Article 9 (Trade or Work Jurisdiction) and Article 11 (Subcontracting) in their provincial agreement. (The grievance

has been held in abeyance pending the outcome of this complaint.) It is noteworthy that the section 124 approach would preclude the direct involvement of Labourers' Local 597. A section 91, of course, gives status to all concerned parties.

8. Stark has taken the approach through a section 91 complaint that, in effect, the assignment of the work to the Labourers (through a subcontract with Oshawa Paving) be confirmed.

9. In my view, it is only through a jurisdictional dispute hearing that the Board can properly assess the claims of the contending unions to the work in dispute. Section 91 should not be interpreted in such a narrow manner that a dispute, which even the respondent union admits has "jurisdictional overtones", should be denied consideration. A section 124 permits the presentation of only one side of the case and can give rise to the suspicion that it is being used to obtain (or defend) work jurisdiction through a back door. I would recommend the listing of this dispute for a hearing under section 91.

10. If the Board is prevented by existing legislation from reaching the heart of the matter in cases of this type, then perhaps the legislation should be re-examined and, if found wanting, revised.

1623-81-U Ontario Nurses' Association, Complainant, v. Homewood Sanitarium of Guelph, Ontario Ltd., Respondent.

Change in Working Conditions – Remedies – Employer pattern of granting general wage increases – Increase denied to unionized employees – Whether breach of statutory freeze period – Board not directing posting of notice due to good faith of employer and technical nature of breach

BEFORE: M. G. Picher, Vice-Chairman, and Board Members F. W. Murray and W. F. Rutherford.

APPEARANCES: *S. Schachter, Marion Perrin, Marianna Schroeder and Rick Zabcocki for the complainant; Allan Shakes, John Macintosh, Merville Vincent and Judith Clarkson for the respondent.*

DECISION OF THE BOARD; February 26, 1982

1. This is a complaint under section 89 of the Act alleging violations of sections 3, 64, 66, 67, 70 and 79 of the *Labour Relations Act*. The thrust of the complaint, notwithstanding the broad nature of the pleadings, is that the respondent has violated the "freeze" provision of section 79 of the Act in the implementation of wage increases.

2. The facts are not in dispute. The respondent operates a psychiatric hospital in Guelph. It has approximately 550 full-time and part-time staff of whom 120 are full-time and part-time nurses. For a number of years the practice of the hospital has been to give a general wage increase to all of its employees in the first pay period of the calendar year, although more

recently it has been at the beginning of April in the first week of the Hospital's newly adopted fiscal year. The wage increase was consistently awarded to all employees except for four operating engineers, whose terms and conditions of employment were governed by a collective agreement. The only material exception to the timing of a general wage increase occurred in 1979, where a wage increase was granted at the start of the year but was supplemented in October when additional funds became available from the Ministry of Health. Consistent with the general practice, however, that increase was given to all employees except the operating engineers whose wages were regulated by a collective agreement.

3. On July 2, 1981 the Board certified the applicant as exclusive bargaining agent for all full-time registered nurses employed by the Hospital. (Board File No. 0509-81-R). On October 16, 1981 a similar certificate issued to the applicant in respect of all part-time nurses (Board File 1372-81-R). After the units were certified the Hospital treated the employees within them differently with respect to general wage increases.

4. On August 21, 1981 the Hospital gave a general wage increase, announcing that wage and salary increases awarded to all employees April 2, 1981 would be retroactive to January 1, 1981. The extra retroactivity was not, however, extended to the full-time registered nurses, who had just been certified and who were covered by the statutory freeze under section 79 of the Act.

5. On October 21, 1981 the Hospital granted an additional general wage increase of 2 per cent effective September 3, 1981. Again the full-time nurses were excluded as well as the newly certified part-time nurses, who were then also subject to the freeze provisions of section 79.

6. Considerable argument was addressed to whether the wage increases of August and October were irregular or whether they fell into the pattern of "business as before" so as to be caught by the statutory freeze. The purpose of the freeze under section 79 is to maintain the *status quo* during and after certification as well as during the early stages of the renegotiation of a collective agreement. During that time the rights and privileges of employees are protected from any unilateral change by the employer, as are the existing management prerogatives of the employer. The stabilizing effect of the provision was commented upon as follows in *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859 at 868:

The 'business as before' approach does not mean that an employer cannot continue to manage its operation. What it does mean is simply that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred, providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of the employees by a trade union. The right to manage is maintained, qualified only by the condition that the operation be managed as before. Such a condition, in our view, cannot be regarded as unduly onerous in light of the fact that it is management which is in the best position to know whether it is in fact carrying out business as before. This is an approach, moreover, that cuts both ways, in some cases preserving an entrenched employer right and in other cases preserving an established employee benefit.

7. In that case the Board found that the employer's failure to apply a pre-existing merit increase policy to unionized employees was in violation of the freeze, even though historically merit increases were awarded in the discretion of the employer. In a case more analogous to this one, *Scarborough Centenary Hospital*, [1969] OLRB Rep. Jan. 1049, the Board found that where a hospital had an existing practice of granting annual wage increases to employees on the anniversary of their employment it was consistent with the requirements of section 79 that it should continue to do so during the freeze period.

8. The facts in this case point to a clear pattern of doing business in the past. All wage increases, including general wage increases at the start of the fiscal year and supplementary increases during the course of the year have been consistently given to all employees except to the operating engineers whose wages are governed by an established collective agreement. The only apparent exception to the pattern occurred in early 1978, when the apparent exception to the pattern occurred in early 1978, when the nurses were awarded a slightly higher wage increase to bring their wages into line with established patterns. Apart from that exceptional occurrence, the consistent pattern has been to advance both prospective and retroactive increases to all employees based upon the funding periodically made available by the Ministry of Health. The wage increases of August 21, 1981 and October 21, 1981 marked the first time that nurses were deprived of increases which were granted following the established practice. In our view that represents a clear departure from the normal pattern of doing business in respect of full-time and part-time nurses. To the extent, therefore, that the wage increase of August 21, 1981 was not applied to full-time nurses and the increase of October 21, 1981 was not given to either full-time and part-time nurses, the Hospital is in violation of section 79 of the *Labour Relations Act*.

9. The Board so declares and orders that the full-time and part-time nurses, respectively, be compensated, with interest, for all wages and benefits lost.

10. We do not consider that a posting order would be appropriate in the circumstances of this case. It appears from the submissions of the parties that the respondent Hospital misconceived the requirements of section 79 of the Act and believed, in good faith, that the provisions of that section prevented it from altering the wages of the organized nurses. In this instance there has been a technical violation of the section, with no evidence of any deliberate attempt to chill union support. In these circumstances the Board will not normally make a posting order. There is no reason to believe that a declaration coupled with an order for compensation will not fully redress the wrong that has occurred.

11. The Board remains seized of this matter in the event of any dispute between the parties in respect of the interpretation or implementation of this decision.

2082-81-U The International Association of Bridge, Structural, and Ornamental, Ironworkers Locals 721, 736, 759, 765 and 786 and Kenneth Childs, Allan MacIsaac, John Donaldson, Larry Baillie, Gordon Verdecchia and Donald Melvin on their own behalf, and on behalf of each and every member of the aforementioned trade unions, and on behalf of the said local trade unions, Complainants, v. **The International Association of Bridge, Structural and Ornamental Ironworkers**, Norman Wilson and James Phair, Respondents.

Practice and Procedure – Trusteeship – Unfair Labour Practice – Allegation that trusteeship imposed on locals to intimidate and coerce – Whether in retaliation against filing unfair labour practice complaint – Whether Board deferring to internal union procedures – Whether dismissing without hearing – Whether particulars inadequate

BEFORE: R. D. Howe, Vice-Chairman, and Board Members S. Cooke and J. Wilson.

APPEARANCES: *James Hayes and David Bloom for the complainants; A. M. Minsky, N. A. Wilson and J. Phair for the respondents.*

DECISION OF THE BOARD: February 17, 1982

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complainants allege that they have been dealt with by the respondents contrary to the provisions of sections 70 and 80(2) of the Act. The essence of the complaint is that by placing the Ironworkers District Council of Ontario (the "Council") under supervision and control ("trusteeship") of the International Association of Bridge, Structural and Ironworkers (the "International") and by various actions taken pursuant to that trusteeship, the respondents have intimidated, coerced and penalized the complainants for filing and pursuing a complaint (Board File NO. 2367-80-U) under what is now section 89 of the Act.

2. At the commencement of the hearing of this matter, counsel for the respondents applied for the dismissal of this complaint without a hearing pursuant to section 71(1) of the Board's Rules of Procedure and made extensive submissions in support of that request. Counsel also requested the Board to decline to hear this matter on the ground that the complainants have not yet exhausted the internal procedures available to them under the International Constitution (the "Constitution"). Without prejudice to that motion, counsel also applied pursuant to section 72(3) of the Rules for a direction requiring the complainants to provide particulars of certain allegations contained in the complaint.

3. After hearing the submissions of the parties with respect to those preliminary matters, the Board reserved its decision on those matters and recessed the hearing.

4. Section 71(1) of the Rules provides:

"Where an application or complaint does not, in the opinion of the Board, make out a *prima facie* case for the remedy requested, the Board may dismiss the application or complaint without a hearing and it shall in its decision state the reason for the dismissal."

Although counsel for the respondents contended that the Board has a duty to dismiss a complaint which does not make out a *prima facie* case, section 71(1) clearly provides the Board with a discretion. In some circumstances it is eminently appropriate for the Board to exercise its discretion under that provision to dismiss a complaint where it is apparent that no useful purpose would be served in listing the complaint for hearing since the facts as alleged could not support an argument that a violation of the Act had occurred (see, for example, *Heist Industrial Services*, 63 CLC ¶16,263; *Patternmakers Association of Hamilton and Vicinity*, [1970] OLRB Rep. Sept. 688; *Ernest D'Andrea*, [1975] OLRB Rep. Aug. 646; *Local 1285 United Automobile Aerospace & Argicultural Workers Union of America*, [1975] OLRB Rep. Apr. 387; *Masonry Contractors' Association (Toronto-Incorporated)*, [1970] OLRB Rep. Dec. 1124; and *Woodall Construction Company Limited*, [1979] OLRB Rep. June 597). However, where as in the present proceedings, the complaint raises subtle questions of fact that are largely dependent upon the inferences that may properly be drawn from circumstances and events that occurred over a relatively lengthy period of time, combined with important and relatively complex issues of labour relations law and policy, the Board is of the view that it is not appropriate to dismiss the matter pursuant to section 71(1) without a full hearing on the merits. Accordingly, the respondent's motion to dismiss this complaint without a hearing pursuant to section 71(1) of the Rules is hereby dismissed.

5. As noted above, counsel for the respondents also contended that the Board should decline to hear the complaint because the procedures contained in the Constitution have not yet been exhausted by the complainants. He advised the Board that a "trusteeship hearing" has been scheduled to be held in Toronto (the head office of the Council) at the Constellation Hotel on March 17, 1982, and that there will be "financial assistance for those who have to come from out of town to attend the hearing". He explained that the trusteeship hearing was not scheduled earlier because an audit had to first be completed.

6. Section 7 of Article XII of the Constitution provides:

"The General Executive Board shall have the power to place any Local Union or other subordinate body of the Association under direct International supervision whenever in its judgment such action is necessary for the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or duties of a bargain [sic] agent, restoring democratic procedures, or otherwise carrying out the legitimate interests of the International Association; provided that such action shall be taken by the unanimous vote of the General Executive Board. The General Executive Board shall present to the next regular meeting of the General Executive Council its action in placing a Local Union under International supervision. At any time while a Local Union is under International supervision pursuant to this section, the General Executive Board may provide, at the expense of such Local Union, for liability insurance, protecting the International Association by virtue of any common law or statutory liability resulting from the act or omission of any officer, agent or employee while engaged in any activity pertaining to the business or affairs of such supervised Local Union. *Within a reasonable time after the General Executive Board has placed a Local Union under International supervision, the General Executive Board or its representative shall hold a full and fair*

hearing to determine the propriety of such action giving reasonable notice of such hearing."

(emphasis added).

The Constitution provides an avenue of appeal to the General Executive Council from decisions of the General Executive Board and also provides for a further appeal to the International Convention (which must be held at least every fifth year).

7. Counsel for the complainants acknowledged that there may be circumstances in which individuals should be required to exhaust internal union remedies before coming to the Board. However, he submitted that this was not an appropriate case for Board deferral since "the deck seems to be stacked" against the complainants in the internal forum, the Constitution is subject to the prevailing law including the *Labour Relations Act*, and the Board, not the internal forum, is the body which has the responsibility for administering that legislation to ensure that the rights it enshrines are effectively protected.

8. In the absence of any allegations that arguably constitute a breach of the *Labour Relations Act*, the propriety of a trade union's behaviour vis-à-vis its members is governed by its constitution and by-laws, and the procedural remedies which these provide, subject to the controlling supervision of the courts (see *Operative Plasters' and Cement Masons' International Association of the United States and Canada, Local 48*, [1974] OLRB Rep. March 169). However, in *Canadian Textile Union*, [1971] OLRB Rep. Aug. 470, the Board referred to the expectation of the Legislature that the Board is the more appropriate forum to adjudicate upon the matters of public policy which find expression in the *Labour Relations Act*, in support of its unwillingness "to accede to the 'contract theory', which indicates that members of a trade union may have contracted to exhaust their rights within the internal trade union machinery before resorting to this Board, where the issue *prima facie* indicates a violation of public policy". In that case, the Board declined to defer to the union's internal procedures where it was alleged that the grievor had been removed from office as president of a local of the International Chemical Workers by certain officials of the International contrary to the predecessors of what are now sections 3, 70, and 80 of the Act. (See also *Imperial Tobacco Products (Ontario) Limited*, [1974] OLRB Rep. July 418.)

9. The majority decision in *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254, contains a thorough discussion of the principles applied by the Board in determining when it will defer to grievance arbitration procedures. Although the examination of those principles arose in a different context, nevertheless a number of the considerations which the Board has found to be relevant in the context of deferral to grievance arbitration procedures set forth in a collective agreement are also of assistance in determining whether deferral to internal review procedures set forth in a union constitution is appropriate. It is generally desirable to discourage dual litigation and forum shopping by encouraging parties to employ initially the contractual procedures to which they have agreed through incorporation into the applicable constitutional document. However, where as in the present case, provisions of the *Labour Relations Act* require important elaboration, and the alleged conduct of the respondents arguably constitutes a violation of fundamental rights under that legislation, the complaint, which raises issues that transcend the interests of the immediate parties, cannot be characterized as essentially an internal union matter best resolved in a domestic forum. Moreover, exhaustion of the internal union procedures could substantially delay the resolution of the pressing issues raised in these proceedings.

10. For the foregoing reasons, the Board declines to defer to the internal procedures set forth in the Constitution.

11. The respondents also applied pursuant to section 72(3) of the Rules for a direction requiring the complainants to provide particulars of certain of their allegations. As noted by the Board in *Guaranteed Insulation '77 Limited*, [1981] OLRB Rep. Oct. 1394, at paragraph 12:

“... the purpose of particulars is to ensure a fair hearing by avoiding prejudice, delay or embarrassment to the opposing parties by enabling them to know in advance what case they have to meet at the hearing. Particulars reduce the risk of opposing parties being taken by surprise and enable them to prepare for cross-examination of the witnesses called by the party alleging the improper or irregular conduct. Particulars also assist opposing parties to determine what witnesses they will need to have available in rebuttal. The *Racine* case, [*Racine, Robert and Gauthier Reg'd*, [1978] OLRB Rep. June 559]... provides the following examples of considerations that are relevant in ruling on the sufficiency and adequacy of the particulars provided by an applicant:

- ‘(1) Whether the allegations substantially identify and describe the offences alleged and indicate the acts or omissions and the time when and place where they occurred and give the names of the persons who committed or engaged in them;
- (2) The knowledge or availability of knowledge possessed by the parties of the circumstances and details of the alleged violations;
- (3) Whether the language of the allegations and the absence of certain particulars are likely to mislead, confuse or cause real prejudice to the opposite party in the preparation of its defence;
- (4) Whether additional particulars sought or demanded are merely descriptive of the evidence by which they are to be proved rather than of the acts or omissions and the time when and place where they occurred and the names of the persons who engaged in or committed them;
- (5) The nature and circumstances of the violations alleged;
- (6) Whether particulars demanded are likely to be required by the party demanding them for the *bona fide* purpose of preparing his defence or whether they are more likely being demanded solely as a technical matter for the purpose of harassing and embarrassing the applicant and to create delay in the disposition of the application.”

Having regard to those considerations, the Board is of the view that the particulars (which exceed six typewritten pages) provided by the complainants are sufficient to satisfy the requirements of section 72, which requires only a concise statement of the material facts, actions or omissions upon which the complainants intend to rely as constituting improper or

irregular conduct, and not the evidence by which the material facts, actions or omissions are to be proved.

12. This matter is referred to the Registrar to be listed for hearing on the merits.

1242-81-R The International Brotherhood of Painters and Allied Trades Local 1824, Applicant, v. **Lynco Painting Contractors** A Division of #374861 Ontario Ltd., Respondent, v. Group of Employees, Objectors.

Construction Industry – Petition – Whether management involvement and threats casting doubt on voluntariness of petition – Whether Board directing vote

BEFORE: Ian Springate, Vice-Chairman, and Board Members S. Cooke and W. H. Wightman.

APPEARANCES: *B. Fishbein and S. McCarrison for the applicant; James E. Bowden and Lynn Hartrick for the respondent; L. Jette and P. Loci for the objectors.*

DECISION OF IAN SPRINGATE, VICE-CHAIRMAN AND BOARD MEMBER S. COOKE; February 25, 1982

1. This is an application for certification filed pursuant to the construction industry provisions of the *Labour Relations Act*.

• • •

[discussion relating to description of the bargaining unit omitted]

9. The parties agreed on a list of bargaining unit employees containing five names. The applicant filed evidence of membership on behalf of three of these employees. The evidence of membership consists of signed applications for membership in the applicant, as well as receipts indicating that the individuals involved have each paid to the applicant the sum of \$1.00 on account of initiation fees. Having regard to this material, and to the definition of a “member” of a trade union set out in section 1(1)(1) of the Act, we find that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on September 15, 1981, the terminal date fixed for this application and the date which we determine, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

10. There were filed a number of statements of desire in opposition to the application signed by all of the employees in the bargaining unit, including the three who had earlier become members of the applicant. If we were satisfied that the statements of desire signed by the three union members represented a voluntary “change of heart” on their part, we would

likely exercise our discretion under section 7(2) of the Act to direct the taking of a representation vote.

11. Before the Board will direct the taking of a representation vote on the basis of employee statements of desire, it must be satisfied that when union members signed a statement of desire evidencing an apparent change of heart, they did so voluntarily and were not motivated by a concern that their failure to sign would be communicated to their employer or could result in reprisals. The Board's concerns in this regard were expressed as follows in the *Radio Shack* case, [1978] OLRB Rep. Nov. 1043:

The Board has long held that there is an onus on a party relying on a statement of desire in opposition to an application for certification to establish that the "sudden change of heart" by those who have signed for the union and shortly thereafter repudiated the union, represents a voluntary change of heart. The Board recognizes the delicate and responsive nature of the employer-employee relationship and having regard to it, is circumspect in its assessment of the voluntariness of any statement of desire which bears the signatures of employees who have also signed cards in support of the union. The Board's approach to these matters is described in the leading *Pigott Motors* case, 63 CLLC 16,264 in the following terms:

"In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories."

Having regard to the sensitive nature of the employer-employee relationship, the Board has consistently held that it must be governed by the overall environment in the work place in deciding whether or not the statement of desire represents a voluntary expression of those who signed it. If the evidence establishes that the hand of management has been actively involved in its origination, preparation or circulation, the Board will dismiss the statement. The Board will also, however, dismiss the statement if the evidence establishes that an employee might reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of his decision to sign it or not to sign it. (See *Morgan Adhesives of Canada Ltd.* and *Canadian*

Paperworkers Union, [1975] OLRB Rep. Nov. 813 and the cases cited therein.)

12. The evidence in this case indicates that Mr. Neil Johnson, who described himself as an estimator, was actively involved with the statements of desire. Mr. Johnson appears to hold a position in the respondent immediately below Mr. Lynn Hartrick, the respondent's owner and President. Mr. Hartrick is frequently away from the respondent's premises attending to the operations of two other firms which he also controls. Mr. Johnson, in consultation with Mr. Hartrick, is involved in both the hiring and firing of employees. Mr. Johnson also assigns work to employees, and he is the only person who supervises the respondent's on-site employees. Mr. Johnson stated that he does not regard himself as part of management. We are satisfied, however, that Mr. Johnson does in fact exercise managerial functions. It is of some interest to note that Mr. L. Jette, an employee representing the group of objectors, was asked his view of Mr. Johnson's status and he replied that he thought Mr. Johnson was part of management.

13. Mr. Johnson testified that he was aware of which employees had signed for the union. Although Mr. Johnson denied having made the comment, we accept the evidence of Mr. Loci, one of the objecting employees, that the day after he signed for the union Mr. Johnson told him that if you guys want to get in the union, we might as well as close the door. Mr. Jette, who also testified on behalf of the objectors, stated that he did not think that Mr. Johnson had made a similar comment to him, although he was not certain. Both Mr. Loci and Mr. Jette testified that they advised Mr. Johnson that they had changed their minds about being represented by the applicant. The two employees did not, however, support Mr. Johnson's assertion that they requested that he prepare statements of desire on their behalf. It is not disputed that Mr. Johnson drafted the wording for the statements of desire, and then arranged for them to be typed. Mr. Johnson also approached the employees to get them to sign the statements of desire. The executed statements were then forwarded to the Board by a member of the respondent's office staff. Mr. Johnson informed Mr. Hartrick of his discussions with the employees and of his involvement with the statements of desire.

14. Having regard to Mr. Johnson's comment to Mr. Loci about the respondent closing its door, as well as Mr. Johnson's active involvement with the origination and execution of the statements of desire, we are unable to accept the statements as truly and accurately reflecting the voluntary wishes of those who signed them free from any managerial involvement. This being the case, we decline to direct the taking of a representation vote on the strength of the statements.

15. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

... , the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

(emphasis added)

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant

affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 3 above in respect of all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

16. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all painters and painters' apprentices in the employ of the respondent in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working, foreman.

DECISION OF BOARD MEMBER W. H. WIGHTMAN;

1. I agree that the majority decision accurately sets out the facts as adduced before us and that the decision is consistent with the Board's practice in denying a vote if the voluntariness of a petition is in doubt.

2. However, I would be remiss were I not to express my reservations over a Board practice which supposes that people, in the privacy of a government-supervised voting booth, will somehow fail to express their true wishes.

3. We are all captives of our personal experiences to one degree or another. While I have been disappointed personally as to the outcome of more than one election, nevertheless the experience has left me more fully convinced than ever as to the preferability of the secret ballot over any other means of determining the wishes of the people in a democratic society.

4. In the instant case it seemed to me that, for whatever reasons, there exists a strong possibility that as of the date of hearing a majority may indeed not have wanted the union. I recognize too that still further changes of heart might occur between the date of hearing and of any subsequent date the Board might have ordered for a vote. To my mind, this reality does not argue against the preferability of the secret ballot as a means of determination over the judgement decision of the Board as its practices have evolved. If the effect of a Board decision in cases such as this is to leave the employer even mistakenly in doubt as to whether the union actually enjoys the support of his employees, or if it serves to visit collective bargaining on an unwilling group of employees, I wonder what positive social purpose has been served and whether that purpose, if it exists, is not more than offset by the potential we have created for unhappy relationships between all three of the parties before us.

5. Therefore, while I concur with the decision in light of the law and the Board's practice, I do so with the foregoing reservation in mind and with all respect to my colleagues.

1250-81-R; 1251-81-R The Toronto Central Ontario Building and Construction Trades Council on its own behalf and on behalf of its affiliates, Applicant, v. **Norfinch Developments Limited**, Norfinch Investments (Canada) Limited, Norfinch Construction (Trans-Canada) Limited, Norfinch Construction (Toronto) Limited, Norfinch Construction (Canada) Limited, Samteit Investments Limited, Samteit Developments Inc., Samteit Corporation, Respondents.

Related Employer – Sale of a Business – Inactive company transferring shares through break-up agreement – Whether sale of business – Whether companies related employers – Companies in hands of executors and not engaged in construction work – Whether causing Board to deny related employer declaration at its discretion

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members W. H. Wightman and S. Cooke.

APPEARANCES: *Alexander J. Ahee, David Johnson and Michael Lloyd for the applicant; Gerald Levitan for Norfinch Developments Limited, Samteit Investments Limited, Samteit Developments Inc. and Samteit Corporation; A. Ziering for Norfinch Investments (Canada) Limited, Norfinch Construction (Trans-Canada) Limited, Norfinch Construction (Toronto) Limited and Norfinch Construction (Canada) Limited.*

DECISION OF THE BOARD; February 18, 1982

1. The applicant has applied to the Board pursuant to sections 1(4) and 63 of the *Labour Relations Act*. The applicant Council maintains pursuant to section 1(4) of the Act that the group of companies including Norfinch Developments Limited, Samteit Investments Limited, Samteit Developments Inc. and Samteit Corporation carry on associated or related activities or businesses and are under common control or direction. The Council seeks a declaration that these companies are one employer for the purposes of the Act in order to establish that the Samteit group of companies is bound by a collective agreement between the Council and Norfinch Developments Limited dated June 20, 1973. Section 1(4) of the Act provides as follows:

Where in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

2. The applicant Council further seeks a finding under section 63 of the Act that a sale of a business has taken place between Norfinch Developments Limited (the signatory to the working Agreement with the Council) as the predecessor employer and Norfinch

Construction (Toronto) Limited as the successor employer. The relevant portion of section 63 of the Act is set out below:

63.1(1) In this section,

- (a) "business" includes a part or parts thereof;
- (b) "sells" includes leases, transfers and other manner of disposition, and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold, is until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purpose of the application as if he were named as the employer in the application.

In the event the Board concludes that the above mentioned sale of a business has taken place counsel for the union then seeks a declaration under section 1(4) of the Act that Norfinch Construction (Toronto) Limited, Norfinch Investments (Canada) Limited, Norfinch Construction (Trans-Canada) Limited, and Norfinch Construction (Canada) Limited carry on associated or related activities or business under common control or direction and are one employer for the purposes of the Act. For clarity we note that at the hearing counsel for the applicant Council stated that his application under section 1(4) of the Act does not extend to seeking a declaration as between Norfinch Developments Limited and Norfinch Construction (Toronto) Limited where there has been no common control or direction for 5 years. For a connection between these companies he relies on section 63 of the Act and maintains that a sale of a business has taken place from Norfinch Developments Limited to Norfinch Construction (Toronto) Limited.

3. The relationship between the various corporations involved in this matter is somewhat complicated. A basic outline of the situation is contained in an agreed statement of facts set out below:

Agreed Facts

- (a) Norfinch Developments Limited was formed by Mr. Sam Teitelbaum in 1969.
- (b) The corporation's objects were to allow it, among other things, to work in all aspects of the construction industry.
- (c) In or about 1970 Mr. Arie Ziering came into the company and became an equal shareholder with Mr. Sam Teitelbaum.
- (d) On June 20, 1973 Norfinch Developments Limited entered into the

working Agreement with the Toronto Central Ontario Building and Construction Trades Council.

- (e) After that date Norfinch Developments Limited engaged in various construction projects on which it honoured the Working Agreement.
- (f) In approximately 1976 a split between the partners (Mr. Teitelbaum and Mr. Ziering) occurred. As a result of the break-up agreement the name of Norfinch Developments Limited was changed to Samteit Developments Inc. on January 29, 1976. At that point, with the change of name, Norfinch Developments Limited cease to exist and Samteit Developments Inc. was formed.
- (g) On May 1, 1979 an amalgamation occurred between Samteit Developments Inc. and Samteit Investments Limited.
- (h) Samteit Developments Inc. and Samteit Investments Limited both have objects which give them the power or authority to carry on business as builders or contractors for the purpose of doing any facet of construction work.
- (i) In the amalgamation agreement between the Samteit companies it was agreed that they would be subject to all of the liabilities, contracts, disabilities and debts of Norfinch Development Limited.
- (j) On June 23, 1980 Samteit Corporation was formed. It is a holding company for trust beneficiaries. Prior to his death Mr. Teitelbaum held 100 per cent of the shares of this company. The object of Samteit Corporation was to purchase and deal in land. The objects of Samteit Corporation are broad enough to include construction in the future.
- (k) Samteit Corporation is allowed to carry on business as Samteit Investments Limited and Samteit Developments Inc.
- (l) The head offices of all the Samteit companies is at 98 Norfinch Drive in Downsview, Ontario.
- (m) Up until June of 1981, Mr. Teitelbaum was the controlling mind of all the Samteit companies. In July of 1981 Mr. Teitelbaum died. At present the Samteit group is in the hands of executors.
- (n) The Norfinch group of companies, apart from Norfinch Development Limited, is active in construction.

4. Initially a group of companies was owned and operated by both Mr. Ziering and Mr. Teitelbaum. On June 20, 1973 one of those companies, Norfinch Development Limited, entered into the Working Agreement with the Council, following which it engaged in certain

construction projects in compliance with the collective agreement. In 1976, however, the two partners split. At the time of the split Mr. Ziering and Mr. Teitelbaum were both shareholders of Norfinch Developments Limited. As well they were the original shareholders of the other Norfinch companies: Norfinch Investments (Canada) Limited, Norfinch Construction (Trans-Canada) Limited, Norfinch Construction (Toronto) Limited and Norfinch Construction (Canada) Limited. The basic structure of the break-up agreement was for Mr. Ziering to purchase Mr. Teitelbaum's interest in the Norfinch companies (apart from Norfinch Developments Limited). Mr. Teitelbaum sold his interest in all of Norfinch companies except Norfinch Developments and purchased Mr. Ziering's shares in Norfinch Developments Limited. Mr. Ziering stated that he bought Mr. Teitelbaum's share in Norfinch Construction (Toronto) Limited. Teitelbaum had been the president holding a 20 per cent share and Ziering had been the secretary-treasurer. Mr. Ziering is now the president of all four Norfinch companies.

5. Mr. Teitelbaum purchased Mr. Ziering's interest in Norfinch Development Limited. According to Mr. Ziering, Mr. Teitelbaum purchased the assets of Norfinch Developments Limited. We conclude on the evidence that this occurred through Teitelbaum's purchase of Mr. Ziering's shares in Norfinch Developments Limited. Mr. Ziering testified that the assets owned by Norfinch Developments were pieces of property in the nature of industrial plazas located at 98 Norfinch Drive, 100 Norfinch Drive and 100 Norfinch Drive as well as some land. He stated that when the split occurred in 1976 between himself and Mr. Teitelbaum, Norfinch Developments Limited was not doing much and was in fact acting like a holding company. He noted that Norfinch Developments Limited started winding down in 1974 or 1975.

6. As part of the break-up agreement Mr. Teitelbaum was precluded from operating a company with the name "Norfinch" in it. Accordingly the name "Norfinch Developments Limited" was immediately changed to "Samteit Developments Inc." which subsequently amalgamated with Samteit Investments Limited. From the point of the break-up to the present time the Samteit companies have not been involved in construction. Their corporate objects, though, are broad enough to enable the companies to engage in all aspects of construction work. At the time of this application Samteit Investments had one bookkeeper and an office clerk.

7. According to Mr. Ziering the only Norfinch company which is active today is Norfinch Construction (Toronto) Limited. Norfinch Construction (Canada) Limited is a holding company which holds the shares of Norfinch Construction (Toronto) Limited. Ziering further commented that this company never did build anything. Similarly Norfinch (Trans-Canada) Limited is also a holding company. It has never engaged in building and, according to Mr. Ziering, is presently winding down. With respect to Norfinch Investments (Canada) Limited Mr. Ziering stated that it is not now and never has been engaged in construction. Instead it is involved in importing goods from Germany. All of these Norfinch companies have their head office at 3070 Ellesmere Road.

8. Mr. Ziering stated that Norfinch Construction (Toronto) Limited, formed in approximately 1971, engages in construction for its own portfolio. He maintains that his company is not bound by the Working Agreement between Norfinch Developments Limited and Council. He maintains and the Board accepts that it, not Norfinch Developments Limited, built the shopping centre at Jane and Finch which was in progress in 1973 when the

Working Agreement was signed. Mr. Ziering stated that when he signed the collective agreement it was his intention that it would only apply to Norfinch Development Limited and not Norfinch Construction (Toronto) Limited.

9. An Addendum to the Working Agreement dated June 20, 1973 was submitted into evidence. The Addendum dated July 11, 1973 is initialed by Mr. Ziering and reads as follows:

ADDENDUM TO AGREEMENT

Between

Norfinch Developments Limited

and the

Toronto Building & Construction Trades Council

"The Council" agrees that all contracts let shall be completed without hindrance from the Council or its affiliated Unions as of July, 11th, 1973 (see attached list).

"The Company" agrees that all contracts for work not tendered as of July 11th, 1973 shall be awarded to Contractors in contractual relationship with Unions affiliated with "The Council".

Norfinch Developments Limited and Toronto Building & Construction Trades Council hereby agree that "jobs" more particularly specified in Schedule "A" attached hereto shall not require Norfinch Developments Limited to award contracts to contractors in contractual relationship with Unions affiliated with "The Council".

Date: July 11, 1973

Attached to the Addendum on the letterhead of Norfinch Developments Limited are the names of two projects with a listing of their respective contractors. One such project is designated as "NORFINCH SHOPPING CENTRE — Jane & Finch". Mr. Ziering testified that he has never seen the schedule that is presently attached to the Addendum. It does not bear his initials. The second designated project was 98 Norfinch Drive which without dispute was done by Norfinch Developments Limited. The Board cannot conclude on the basis of this evidence that Norfinch Construction (Toronto) Limited either became bound by the Working Agreement or is now estopped from claiming that it is not bound by the agreement as suggested by counsel for the union.

10. Mr. Michael Lloyd is a business representative of the Council. He is responsible for organizing general contractors and policing and enforcing the working agreements. During the second week of August of 1981 Mr. Lloyd received a call from an affiliated union informing him that he was on a job of Norfinch Construction and that they were using non-union people. With further investigation it became clear that the job was being done by Norfinch Construction (Toronto) Limited. The instant applications were filed forthwith.

11. Mr. David Johnston, the business manager and financial secretary of the Council, stated that the Council updates its list of companies with whom it has collective agreements every eighteen months. In 1980 they carried out a particularly thorough investigation through the use of students. Students were instructed to inquire into the name, phone number and, where necessary, the principals of the companies. The address they had for Norfinch Developments Limited was 3070 Ellesmere Road which is different than the address on the Working Agreement. Apparently, no one on behalf of the Council made sufficient inquiries to realize that Norfinch Developments Limited had become a Samteit company and was entirely segregated from the present Norfinch companies.

12. Counsel for the Council maintains that a sale of a business within the meaning of section 63 of the Act has taken place between Norfinch Developments Limited as the predecessor employer and Norfinch Construction (Toronto) Limited as the successor. On this basis he argues that Norfinch Construction (Toronto) Limited is bound by the collective agreement, still in effect, which was originally entered into between Norfinch Developments Limited and the Council. If the Board concludes that a sale has taken place he then seeks a section 1(4) declaration as between the present Norfinch companies. Counsel further seeks a declaration that Norfinch Developments Limited, Samteit Developments Inc. (the company which developed from Norfinch Developments Limited), Samteit Investments Limited (the company which amalgamated with Samteit Developments Inc.) and Samteit Corporation are one employer for the purposes of the Act.

13. The Board cannot conclude on the evidence that a sale of a business within the meaning of section 63 of the Act took place between Norfinch Developments Limited as the predecessor employer and any of the other Norfinch companies, including Norfinch Construction (Toronto) Limited. Mr. Ziering testified without contradiction that at the time of the break-up of the relationship between Mr. Teitelbaum and Mr. Ziering Norfinch Developments Limited was not doing construction work and was instead acting like a holding company. Mr. Ziering, the president of Norfinch Construction (Toronto) Limited, the company still active in construction, did not as part of the break-up agreement purchase any part of Norfinch Developments Limited, the party to the collective agreement in issue. Instead Mr. Teitelbaum bought Mr. Ziering's shares in Norfinch Developments Limited. There is no "business" that was being carried on by Norfinch Development Limited which, through the break-up agreement, was passed to Mr. Ziering or his Norfinch companies. Mr. Ziering simply sold his interest in Norfinch Development to Mr. Teitelbaum. Everything that was owned by Norfinch Development at the time of the break up stayed with Norfinch Development. The only thing that changed through the transaction was the ownership of the shares within the company, Mr. Ziering disposing of his shares to Mr. Teitelbaum. Accordingly, no part of Norfinch Developments Limited was transferred to Mr. Ziering or any of the other Norfinch companies. In the absence of such a transfer the Board cannot conclude that a sale of a business between Norfinch Development Limited as the vendor and Norfinch Construction (Toronto) Limited or any of the other Norfinch companies as the purchaser has taken place.

14. We turn to the application under section 1(4) of the Act. Samteit Investments Limited amalgamated with Samteit Development Inc. which was the name to which Norfinch Developments Limited had been changed following the break-up agreement. Samteit Corporation was formed in 1980 for the purpose of purchasing and dealing in land. It is apparent from the evidence that from the amalgamation of Samteit Developments Inc. and

Samteit Investments Limited, at least, those two companies have been under common control or direction. As well, Mr. Teitelbaum was the sole shareholder of Samteit Corporation which is permitted to carry on business as Samteit Investments Limited and Samteit Development Inc.. It is common ground that Mr. Teitelbaum was the controlling mind and guiding force of all the Samteit companies up until his death in 1981 and that they all have the same head office at 98 Norfinch Drive. From the point of Mr. Teitelbaum's death the Samteit group of companies has been in the hands of executors.

15. The Board is satisfied on this evidence that Norfinch Developments Limited and the three Samteit companies in question are under common control and direction and carry on associated or related activities or businesses within the meaning of section 1(4) of the Act.

16. While the criteria have been met for the issuance of a declaration under section 1(4) of the Act the question arises as to whether this is an appropriate situation for the Board to exercise its discretion to do so.

17. The circumstances of this case are unusual. When Mr. Ziering signed the Working Agreement on behalf of Norfinch Developments Limited, the company was actively engaged in construction. Following the signing of the Agreement it engaged in various other construction projects on which it honoured the Working Agreement. The evidence would indicate that at least by 1976 it was no longer actively engaged in construction work. Moreover, at present none of the Samteit companies is engaged in construction work. It is clear, however, that all three companies have corporate objects which are broad enough to encompass any aspect of construction work. At present these companies are in the hands of executors and their future direction is unclear. If they were to engage in construction work it would clearly be a situation for the exercise of the Board's discretion. If they don't then the Council will not need a declaration.

18. The parties are before the Board now. In the Board's view little purpose would be served by requiring the Council to seek the same declaration under section 1(4) of the Act at a later point in time, if and when one of the Samteit companies moves into construction. The declaration results in no appreciable prejudice to the Samteit companies. On the other hand to deny the declaration could bring prejudice to the Council through the delay which would accompany a further application to the Board at a time when any one of three Samteit companies may in fact be engaging in construction.

19. Accordingly, and for the reasons set out above, the Board declares that Norfinch Developments Limited, Samteit Developments Inc., Samteit Investments and Samteit Corporation are one employer for the purposes of the Act.

20. Further, for the reasons set out above, the Board cannot conclude that a sale of a business has taken place between Norfinch Developments Limited as the predecessor employer and any of the other Norfinch companies including Norfinch Construction (Toronto) Limited as the successor employer.

21. The Council's application under section 63 of the Act is therefore denied. Given the Board's disposition of the Council's application under section 63 of the Act it is unnecessary to consider the section 1(4) application as between the existing Norfinch Companies controlled by Mr. Ziering. The union has no bargaining rights for any of these companies. For these

companies the link to bargaining rights was through an alleged sale of a business which the Board has concluded did not take place. The union's application under section 1(4) relating to the Samteit companies, however, is allowed with the accompanying declaration as set out above.

1786-81-JD Labourers' International Union of North America, and Labourers' International Union of North America, Local 1059, Complainants, v. **Ontario Hydro**, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 527, Respondents.

Jurisdictional Dispute – Dispute between Labourers' and Plumbers' Unions over work assignment by Ontario Hydro – Collective agreement requiring submission of disputes to IJDB – Whether fact that IJDB not making decisions giving jurisdiction to OLRB

BEFORE: Ian Springate, Vice-Chairman, and Board Members J. A. Ronson and H. Simon.

APPEARANCES: *S. B. D. Wahl, L. Parker and G. Flook for the complainants; H. A. Beresford for Ontario Hydro; A. Ahee and T. Berry for United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 527.*

DECISION OF IAN SPRINGAGE, VICE-CHAIRMAN, AND BOARD MEMBER J.A. RONSON; February 19, 1982

1. This is a complaint under section 91 of the *Labour Relations Act* in which the Labourers' International Union of North America and Labourers' International Union of North America, Local 1059 (the "Labourers") are requesting that the Board issue a direction with respect to the assignment of certain work. It is the position of the respondents, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 527 (the "U.A.") as well as Ontario Hydro, that in the circumstances present here the Board lacks jurisdiction to issue any direction under section 91.

2. Ontario Hydro is currently engaged in the construction of two generating stations in Bruce County ("Bruce"). The complaint concerns certain work (henceforth generally referred to as "the work in dispute") which the Labourers have described in the following terms:

All work in connection with the transport, set-up, operation, clean-up

and dismantelling [sic] of carbide or diamond bit concrete core drilling machines and vacuum systems, boring holes greater than one and seven eights inch in diameter in concrete structures to any required depth for the through passage of pipe ("the Work") at the Respondent, Ontario Hydro's projects known as Bruce Generating Station "A" and Bruce Generating Station "B", Bruce County, Ontario ("the Projects").

It should be noted that Ontario Hydro is engaged in the construction of another generating station at Pickering, where work similar to the work in dispute at Bruce is also being performed.

3. Members of the Labourers' union employed by Ontario Hydro at both Bruce and Pickering are covered by the terms of a collective agreement entered into between The Electrical Power Systems Construction Association and the Ontario Allied Construction Trades Council, of which the Labourers' union is a constituent member. Members of the U.A. employed by Ontario Hydro at Bruce and Pickering are covered by a collective agreement between The Electrical Power Systems Construction Association and the U.A. These collective agreements contain the following provisions respecting jurisdictional disputes:

For the Labourers

- 10.03 In the event that a jurisdictional dispute arises over a work assignment, the Employer will make an assignment for the work to be done. If any Union or Unions disagree with such a work assignment, the parties will settle such jurisdictional dispute in accordance with procedure as outlined by the Impartial Jurisdiction Disputes Board for the Construction Industry of the Building Trades Department, AFL-CIO.
- 10.04 In the event that a jurisdictional dispute cannot be settled on a local basis by the Unions involved, it shall be submitted to the International Unions involved for settlement without permitting it to interfere in any way with the progress of the work at any time. In the event the dispute is not settled by the International Unions involved, it shall then be submitted to the Impartial Jurisdiction Disputes Board for the Construction Industry for resolution. Those Unions and Employers involved shall advise the Council and EPSCA respectively, in writing, of an intent to submit a jurisdictional dispute to the Impartial Jurisdiction Disputes Board and will identify the work in question. The decision of the Impartial Jurisdiction Disputes Board will be final and binding to the parties to this Agreement.
- 10.05 EPSCA shall have direct recourse to the Impartial Jurisdiction Disputes Board for the Construction Industry when the Impartial Jurisdiction Disputes Board for the Construction Industry has under its consideration a dispute involving the assignment of work being done by employees who are covered by this Agreement.

- 10.06 In the event that the Impartial Jurisdictional Disputes Board for the Construction Industry fails to render a decision within sixty (60) days of the disputed assignment, EPSCA shall have recourse to the Ontario Labour Relations Board for a decision.

For the U.A.

- 6.2 In recognition of the Union's jurisdictional claims, it is understood that the assignment of work and the settlement of jurisdictional disputes with other Building Trades organizations shall be adjusted in accordance with the procedure established by the Impartial Jurisdictional disputes Board, or any successor agency of the Building and Construction Trades department. When a jurisdictional dispute exists between unions and upon request by the United Association, the Employer shall furnish the U.A. Director of Canada Affairs a signed letter from a duly authorized official of the company on Employer stationery, stating whether or not the Union was employed on specific types of work on a given project. The Employer agrees to consider evidence of established practices within the industry when making jurisdictional assignments.

- 6.3 When there is a dispute as a result of a prejob mark-up, the Employer will make an assignment only after;

- (i) evidence has been submitted by the unions involved within a time limit specified by the Employer;
- (ii) all evidence submitted has been evaluated by the Employer.

A copy of such assignments shall be submitted to the U.S. Canadian Office. Where a local of the Union is in disagreement with an Employer's work assignment, the U.A. Canadian Office can submit the dispute in accordance with section 6.2 above and the Employer shall supply the U.A. Canadian Office with a copy of the evidence submitted by the other union(s)—involved along with drawings and/or prints plus a description of the work or process in dispute from a qualified representative of the Employer when requested.

- 6.4 The International Representative of the Union will advise the Association in writing of his intent to submit a jurisdictional dispute to the Impartial Jurisdictional Disputes Board and will identify in detail the work in question. The decision of the Impartial Jurisdictional Disputes Board will be final and binding to the parties to this agreement.
- 6.5 There shall be no sit down or work stoppage because of jurisdictional disputes.

- 6.6 In the event that the Impartial Jurisdictional Disputes Board for the Construction Industry fails to render a decision within sixty (60) days of the disputed assignment, the Association and the Union shall have recourse to the Ontario Labour Relations Board for a decision.

4. The above-quoted provisions in the collective agreements are of some import due to the provisions of section 91(14) of the Act which both the U.A. and Ontario Hydro claim to be applicable to these proceedings. This section provides as follows:

91 (14) The Board shall not inquire into a complaint made by a trade union, council of trade unions, employer or employers' organization that has entered into a collective agreement that contains a provision requiring the reference of any difference between them arising out of work assignment to a tribunal mutually selected by them with respect to any difference as to work assignment that can be resolved under the collective agreement, and such trade union, council of trade unions, employer or employers' organization shall do or abstain from doing anything required of it by the decision of such tribunal.

5. During or about 1970, Ontario Hydro assigned the work in dispute at Bruce to the Labourers, and it continued to do so until the events giving rise to these proceedings. Ontario Hydro also assigned the work in dispute at Pickering to the Labourers. In May of 1981, the U.A. laid claim to the work in dispute at Pickering, and to this end laid a formal claim to the work with the Impartial Jurisdictional Disputes Board for the Construction Industry (the "IJDB"). In a letter addressed to the General President of the Labourers' International, the General President of the U.A. International, and Ontario Hydro, Mr. Dale Witcraft, the Chairman of the IJDB, set out the IJDB's award as follows:

At its meeting May 28-29, 1981, the Impartial Jurisdictional Disputes Board considered the jurisdictional dispute between the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry and the Laborers International Union of North America over core boring of holes in concrete for pipe, Pickering Nuclear Plant project, Pickering Ontario Canada, Ontario Hydro contractor.

The Board voted to make the following job decision: The work in dispute is governed by the decision of record of May 5, 1926 and shall be assigned to plumbers and steamfitters (i.e. to members of the U.A.).

This action of the Board was predicated upon particular facts and evidence before it regarding this dispute and shall be effective on this particular job only.

The Board is a private organization formed to determine jurisdictional disputes between parties to the Plan for Settlement of Jurisdictional Disputes in the Construction Industry. In accord with Article VII, Section 4, of the Plan, employers which are bound by the Plan are requested to comply with this job decision.

6. On June 15, 1981, Ontario Hydro wrote to the IJDB requesting a re-hearing with

respect to its assignment at Pickering. Mr. Witcraft replied to this request on June 23, 1981. The key portion of Mr. Witcraft's reply read as follows:

By direction of the Joint Administrative Committee Plan for the Settlement of Jurisdictional Disputes in the Construction Industry, no meetings of the Impartial Jurisdictional Disputes Board are presently scheduled.

Accordingly, your request for a rehearing is denied.

7. Apparently on or about October 9, 1981, the U.A. requested the Ontario Hydro implement the IJDB Pickering award at Bruce. On October 14, 1981, Ontario Hydro's Personnel Officer at the Bruce site, Mr. J. Miller, denied the request, noting that the IJDB award stated that it was effective only on the Pickering job. Mr. Miller's view on the matter, however, was not shared by Mr. W. S. O'Neill, Ontario Hydro's Construction Labour Relations Manager. On November 2, 1981, Mr. O'Neil wrote the following letter to both the U.A.'s Director of Canadian Affairs, and a Canadian-based Vice-President of the Labourers' International:

Dear Sirs:

Concrete Core Drilling

Earlier in the year the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada proceeded to the Impartial Jurisdictional Disputes Board in Washington seeking a decision on the proper work jurisdiction of the core drilling of holes in concrete structures for the passage of pipe. This dispute originated at Pickering GS where the work in dispute had been assigned to the Laborers' International Union of North America.

On May 29, 1981, the Impartial Jurisdiction [sic] Disputes Board rendered a decision and awarded the work to the United Association. The Board based its decision on an Agreement of Record dated May 5, 1926. This decision was implemented at the Pickering Project.

On June 15, 1981, pursuant to Section 8 of the Procedural Rules and Regulations of the Impartial Jurisdictional Disputes Board, Ontario Hydro lodged an appeal of the May 29, 1981 decision. That appeal was denied.

Accordingly, please be advised that effective November 9, 1981, Ontario Hydro will be implementing this decision on all other work locations in the Province.

8. Prior to the November 9, 1981 date set by Mr. O'Neill, representatives of the Labourers and U.A. met to try to reach agreement on the dispute, but without success. The instant complaint was filed by the Labourers on November 17, 1981. In the complaint the Labourers contended that the reassignment of the work at Bruce had created tensions such that there was a real likelihood of a work stoppage. On the basis of this contention the

Labourers asked that the Board make an interim assignment of the work prior to hearing full evidence with respect to a final direction. Because of the alleged threat of an unlawful work stoppage and the request for an interim assignment, the Board set this matter down for a hearing two days after it had been filed, namely on November 19, 1981. On November 19th, the parties indicated that because of the speed in which the matter had been listed for hearing, they were not in a position to deal with the complaint, and thus the matter was adjourned until November 26, 1981. Prior to the adjournment on November 19th, however, counsel for Ontario Hydro indicated that he would be relying on section 91(14) of the Act to contend that the Board lacked jurisdiction to entertain the complaint due to the requirement in both of the applicable collective agreements that the parties take jurisdictional disputes to the IJDB. In response to this, counsel for the Labourers contended that the IJDB was no longer operational. Counsel for the U.A., however, took the position that if the Labourers were claiming that the IJDB was no longer operating, the Labourers were required to bring forth some evidence to substantiate the contention.

9. The raising of the status of the IJDB at the hearing on November 19th led to certain consultations between local and international officials of the Labourers' union. On November 20, 1981, the General President of the Labourers' International requested that the IJDB make a determination with respect to the work in dispute at Bruce. Mr. Witcraft of the IJDB wrote as follows to the General Presidents of the two International unions.

Pursuant to action of the Joint Administrative Committee, effective May 21, 1981, the Impartial Jurisdictional Disputes Board is not presently making or issuing job decisions. All other provisions of the Plan for the settlement of Jurisdictional Disputes and the Procedural Rules and Regulations continue in full force and effect.

Accordingly, both International Unions are requested to continue efforts to settle this jurisdictional dispute directly.

10. On November 23, 1981, Ontario Hydro forwarded the following telegram to Mr. Witcraft at the IJDB:

Ontario Hydro has implemented the Board decision of May 29, 1981 re Core Boring Holes. The Labourers' International Union has filed a complaint with the Ontario Labour Relations Board arguing IJDB is no longer in effect, therefore, Ontario Hydro is in error making the assignment. The hearing is scheduled for Thursday, November 26, 1981. Please advise status of IJDB prior to November 26, 1981.

This telegram was replied to as follows by Mr. Witcraft on November 25, 1981:

Re tel. November 24, 1981 regarding complaint filed by Laborers in jurisdictional dispute with United Association over core boring of holes in concrete for pipe, Pickering Nuclear Plant Project, Pickering Ontario Canada, Ontario Hydro Contractor, plan for the settlement of jurisdictional disputes in construction industry still in full force and effect, with the exception: Board not currently issuing job decisions, jurisdictional disputes are to be settled directly by unions involved, if

direct settlement not reached, contractor must proceed with disputed work in accordance with original assignment.

11. Ontario Hydro's telegram to the IJDB of November 23, 1981 did not refer specifically to the Bruce site. From Mr. Witcraft's reply, it is clear that he was of the impression that the dispute continued to center around Pickering. However, on the basis of Witcraft's reply stating, "if direct settlement not reached, contractor must proceed with disputed work in accordance with original assignment", Ontario Hydro reassigned the work in dispute at Bruce back to the Labourers. Accordingly, when this matter came back on for hearing on November 26, 1981, the work had been reassigned to the Labourers. Further, counsel for Ontario Hydro advised the Board that it was Ontario Hydro's intention to continue assigning the work to the Labourers unless otherwise directed by the IJDB.

12. At the November 26th hearing, counsel for the Labourers contended that this Board should make a determination with respect to the jurisdictional dispute between the two unions. Counsel contended that the Labourers had exhausted the IJDB procedures without that body having rendered a final decision, and that the Labourers desired, and were entitled to, a final resolution of the matter. This position was disputed by both the U.A. and Ontario Hydro. Both of these parties adopted the view that the current assignment to the Labourers was in accord with the procedures of the IJDB and should remain untouched, unless and until altered by the IJDB. The U.A. contended that the Labourers were seeking to remove the entire issue from the IJDB out of a concern that if the IJDB does in the future consider the issue on its merits, it will likely make the same award as it did with respect to Pickering, namely, award the work to the U.A.

13. This Board has general authority to deal with jurisdictional disputes in the Province. However, section 91(14) of the Act prohibits the Board from inquiring into a complaint where the parties in a collective agreement have agreed to refer the dispute to a mutually selected tribunal. In enacting this provision, the Legislature doubtless had in mind the IJDB and its predecessors. It should be noted that in most situations there are real advantages to both trade unions and employers in having jurisdictional disputes taken to the IJDB. Traditionally, submissions have been put before the IJDB by officials of the International unions, largely in written form. There have not been any lengthy hearings. Decisions of the IJDB have tended to be based on certain "decisions of record" without setting out the rationale behind the tribunal's decisions. These factors, when taken together, have resulted in the IJDB being able to make work assignment awards more quickly than has this Board. Going to the IJDB has also had its drawbacks, however. The decisions of record relied on by the IJDB frequently date back to the 1920's and, accordingly, in the view of some, fail to reflect existing realities. Further, since IJDB awards have been restricted to a particular job site, without any discussion of the principles underlying the award, decisions generally have been of little value in helping with the assignment of work on later jobs, particularly where the work differs somewhat from that dealt with by the IJDB. While the procedures of this Board, with full hearings and reasoned decisions, make for a slower decision-making process, the Board's decisions and reasoning are such that they can be relied on by parties with respect to future work assignments. This is true even where the work differs from that actually before the Board, in that the principles and criteria developed by the Board can frequently be applied to other fact situations. Another major difference between this Board and the IJDB is that this Board has a much greater degree of stability. The IJDB is essentially a voluntary organization created by, and in large measure dependent on the good will of, the trade unions belonging to

the AFL-CIO's Building Trades Department. Because of this, on several occasions the IJDB and its predecessors have faced operational difficulties caused by a lack of agreement among the construction trade unions concerning how the IJDB should operate and the degree of support that unions should give to both the tribunal and its determinations. It perhaps should be noted at this point that, notwithstanding many predictions of its imminent demise, the IJDB and its predecessors have in the past shown a remarkable ability to reorganize and continue their operations.

14. We have discussed the relative merits of this Board and the IJDB not with a view to reaching any conclusions as to which is the better forum for handling jurisdictional disputes, but only to stress that while the IJDB does have certain very real advantages, most notably speed, it does have its own disadvantages, including the fact that it is prone to operational difficulties. Presumably, trade unions and employers which are active in the construction industry are familiar with both the advantages and disadvantages of the IJDB and have those in mind when they decide whether or not to agree to include provisions in their collective agreements requiring that jurisdictional disputes be submitted to the IJDB.

15. In the instant case, the council of trade unions to which the Labourers belong agreed that any jurisdictional disputes will be settled "in accordance with procedure as outlined by the Impartial Jurisdictional Disputes Board". In our view, the Labourers are bound by this agreement for the duration of the term of the collective agreement, and are not entitled to decide that any particular dispute should not be dealt with under the IJDB procedures. Article 10.06 of the collective agreement binding on the Labourers provides that if the IJDB fails to render a decision within sixty days of the disputed assignment, The Electrical Power Systems Construction Association, of which Ontario Hydro is a member, shall have recourse to this Board. It may well be that if the evidence indicated that the IJDB had entirely ceased operations and could not deal with this dispute within a reasonable time period, this Board might conclude that section 91(14) of the Act was not applicable and that any affected party could bring the matter before this Board. On the evidence, however, it is apparent that the IJDB has not ceased operating entirely, and that although it is not currently issuing "job decisions" it is still requiring that parties follow the procedure of the plan for the settlement of jurisdictional disputes in the construction industry. When the Labourers referred this matter to the IJDB they were advised that although the IJDB was not making "job decisions", the other provisions of the settlement plan were in effect, and that the two unions were requested to try to settle the matter directly. The Labourers did not seek to determine what should happen if no such settlement could be reached, but it is clear from the IJDB's response to Ontario Hydro that in such a situation the IJDB requires that the original assignment of the work be continued. While Mr. Witcraft's telegram to this effect to Ontario Hydro referred to the Pickering job, in that he apparently was under the impression that the parties were still concerned with that site, presumably his response would have been the same if he had been aware of the fact that the dispute centered around the Bruce project. This is a point which could have been clarified by any of the parties by advising the IJDB of the location of the actual dispute and seeking a clarification of Mr. Witcraft's telegram to Ontario Hydro.

16. We are satisfied that the Labourers are bound to the procedures of the IJDB, and that these procedures are still operative. Accordingly, we are of the view that this Board lacks jurisdiction to deal with this matter. It should be noted that the Labourers will not suffer any prejudice as a result of this determination. The Labourers have now been assigned the work in dispute at Bruce and Ontario Hydro has indicated that it will not make any reassignment

unless directed to do so by the IJDB. The Labourers, through the Ontario Allied Construction Trades Council, have agreed in their collective agreement to having the IJDB decide jurisdictional disputes and, accordingly, if the IJDB in the future directs that the work be reassigned to the U.A., such a direction will have been made by the tribunal so empowered to do so under the Labourers' own agreement.

17. Having regard to our conclusion that this Board lacks jurisdiction to deal with this matter, these proceedings are hereby terminated.

18. The decision of Board Member H. Simon will be forthcoming at a later date.

0079-81-M Ontario Nurses' Association, Applicant, v. Ontario Nurses' Association Staff Union, Respondent.

Employee – Employee Reference – Whether person reporting directly to manager having authority for hiring and firing excluded as confidential – Whether office manager managerial – Coordinators included in unit by recognition – Whether duties sufficiently changed since to justify exclusion

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. D. Bell and B. L. Armstrong.

DECISION OF THE BOARD; February 23, 1982

1. This is an application pursuant to section 106(2) of the *Labour Relations Act*, requesting the Board to determine whether Elizabeth Wall, Karin Lehnhardt, Dan Anderson, Ioma Robinson and Bharrat Latchman are "employees" for the purposes of the Act. The Board has now reviewed the Report of the Labour Relations Officer, together with the written submissions of the parties. The relevant provision of the Act is section 1(3)(b) which reads:

1 (3) Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee,

(a) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

2. Elizabeth Wall is the administrative assistant to both the Director of Human Resources and the Director of Association Services. In the latter capacity, it is Ms. Wall's function to attend in the role of recording secretary the meetings of all committees of the Association's Board of Directors, including the Executive or "Working" Committee. In the period before this application was filed, not all of the Board's committees were called upon to meet. But for those that did, it appears that Ms. Wall attended as the recording secretary, and the Board is satisfied that this is in fact a regular part of her job.

3. The predominant portion of Ms. Wall's job appears to relate to the Director of Human Resources, Jean Lowery, to whom she reports directly, and who functions broadly in the capacity of a Personnel Director. The Director of Human Resources has the primary responsibility (along with the Chief Executive Officer) for the hiring and firing of staff and, more importantly here, for the negotiation and administration of both collective agreements with the staff Association. Ms. Wall has full access to all manner of files stored within her department, and which she has been in the process of reorganizing. In her support role to Ms. Lowery, Ms. Wall both receives and types the full range of confidential labour relations material that one might expect: instruction and opinion letters passing between the Association and its counsel, background reports on grievances to assist counsel in preparing for arbitrations, and draft proposals and "position papers", for internal circulation, in respect of ongoing contract negotiations. While Ms. Wall was candid in admitting her difficulty in pinpointing which of these specific functions were exercised in the short period preceding the application, as opposed to after it, she was able to identify sufficient instances to again satisfy the Board that she does in fact function in the capacity described, and that her exposure to the internal workings of the Human Resources department is virtually complete. In the Board's view, her position is a classic example of the kind of position for which the "confidential" exclusion was intended. The Board finds that Ms. Wall is not an "employee" within the meaning of the *Labour Relations Act*.

4. Karin Lehnhardt is the Administrative Services Supervisor, and was hired in July of 1980. Her exclusion concerns the office and technical unit, which is described as:

All office and technical employees of the Employer save and except the Officer [sic] Supervisor, Administrative Assistant to the Chief Executive Officer, those above the rank of Office Supervisor and Professional Administrative employees.

There is no longer a position called "Office Supervisor", and the evidence of Anne Gribben, the applicant's Chief Executive Officer, is that it has been replaced by the expanded position which Mrs. Lehnhardt now occupies.

5. Basically, Mrs. Lehnhardt appears to function in the general role of an office manager. Although the decision is clearly not hers alone, she appears to be effectively involved in the interviewing and hiring of head office staff generally, and particularly so with respect to the employees that report to her directly. In the latter regard, the receptionist and mailroom clerk are under her direct supervision, as well as students and temporary staff hired from time to time. She has the authority to direct the temporary-hiring agencies not to re-assign a particular employee to the applicant, and on her own initiative decided to change agencies at one point. She deals with any complaints or problems which arise with respect to the staff reporting to her, and authorizes both their overtime and time off. She is expected to issue oral or written warnings if necessary, but has not yet had occasion to go that far. Mrs. Lehnhardt carried out a formal evaluation with Ms. O'Neill, the receptionist, and recommended that Ms. O'Neill be upgraded to a higher level. This recommendation was accepted. Mrs. Lehnhardt has a general authority to order equipment and material for all of the Association's offices and uses her own discretion as to when the approval of the Controller should be sought. While many of her activities are of a routine, administrative nature, the Board finds that Mrs. Lehnhardt does exercise sufficient authority and discretion in her overall function as office manager to warrant exclusion under section 1(3)(b) of the *Labour Relations Act*. The Board declares Mrs. Lehnhardt not to be an "employee" for the purposes of the Act.

6. The remaining three individuals in dispute are all classified as “co-ordinators” within the applicant’s organizational structure. All three are presently included in the respondent’s “professional administrative” bargaining unit. There are other individuals, classified as “Co-ordinators”, who are included in the office and clerical bargaining unit of the respondent, and these individuals are not in dispute. Both of the bargaining units arose out of a voluntary recognition agreement. The evidence of Anne Gribben, respecting the history of the Co-ordinators’ agreed inclusion in the bargaining units, is instructive:

... At that time I entered into discussion with the executive of the union on the basis of what had initially been discussed as a scope clause and said at that time I wish co-ordinators to be excluded. We had considerable dialogue on this. My main concern was that although some of the co-ordinators were now coming into play in relationship to having people under them to direct, nevertheless their functions would be as a supervisor and a co-ordinator of the programs that they would in fact have the managerial functions one warrants and gives to a person in that category. The union took exception to it at the time and said that it was relatively, that the positions were relatively new in terms of the people they would be directing. They were not convinced in fact they were carrying out the role as outlined by the employer and stated at that time that they were not prepared to agree to their exclusions. However, if in fact what I said was true and proved to be true in the future and they did exercise these functions, then naturally, if the union didn’t agree with me, I could go to the Board and have the positions, and have the positions examined, and that’s basically then why they were in at that time.

The question before the Board then is whether each of the Co-ordinator positions in dispute have evolved to the point where the responsibilities being carried out are no longer compatible with inclusion in the bargaining unit. (Cf. *Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121.)

7. Bharrat Latchman is the Research Co-ordinator. It is the function of his area to carry out special research projects as requested, to provide backup information for collective bargaining, and to circulate appropriate reference material to staff on a regular basis. Mr. Latchman works at the applicant’s head office in Toronto, and reports to the Senior Executive Officer, Operations. He has reporting to him in turn a Research Officer, a Research Assistant, and a Librarian. Given the nature of their work, Mr. Latchman indicates that each of these individuals functions in large measure on their own, and their areas of responsibility are known. Mr. Latchman becomes involved only in terms of responding to a backlog, or in identifying areas of priority. These the Board notes are typical functions of a Group Leader. Mr. Latchman spends the bulk of his own time carrying out research. By his own admission, Mr. Latchman’s role in hiring is limited, and has never been specifically discussed with him by his superiors. Neither has he been advised that it is his responsibility to discipline, or recommend discipline. Mr. Latchman has no input into the budget for his department, and the specific direction the department’s work will take stems largely from consultative meetings with other co-ordinators and the arbitration officers. None of those individuals are excluded from the bargaining unit. The Board on the whole finds Mr. Latchman, by his evidence, to be performing more the role of a team leader within the unit than a member of management, and finds no basis to now exclude him. The Board finds that Mr. Latchman continues to be an “employee” for the purposes of the Act.

8. Ioma Robinson is the Co-ordinator of the Education Centre. The Centre and its staff are located in Ottawa, and Ms. Robinson is the only one of the three Co-ordinators who reports directly to Anne Gribben, the Chief Executive Officer. The role of the Centre is to develop and carry out programs which will meet the education and training needs of the Association's members, its staff, and the Board of Directors. When Ms. Robinson began in 1975, she was the Centre's only staff member and worked out of Toronto. At that time Ms. Robinson not only developed the program but did virtually all of the teaching herself. As the size of the Association and its needs have grown, the Centre has added two full-time education offices and an administrative assistant, all upon the recommendation of Ms. Robinson. Ms. Robinson in fact selected the administrative assistant on her own, and that individual was not interviewed by anyone else in the Association. With the increase in staff and demands, Ms. Robinson now spends virtually all of her time developing program ideas and training and supervising her subordinates. She personally monitors the seminars of her officers when she is able, but otherwise relies on feedback from those attending. She feels it is her responsibility to recommend discipline where necessary. She regularly meets with members of management, including the Board of Directors, for the purpose of developing policy objectives. She prepares her own budget, which is now in the neighbourhood of \$90,000, and no budget which she has submitted has ever been cut back. Within that budget, Ms. Robinson can expend and allocate funds as she chooses, including the hiring of guest speakers of her own selection. If a request is made for a new type of program to be implemented, Ms. Robinson assesses the need against the funds available in the budget, and decides whether to go ahead with it. The Board is satisfied on the evidence that Ms. Robinson does in fact operate at the managerial level, and is not an "employee" for the purposes of the Act.

9. Finally, Dan Anderson is the Co-ordinator of Employment Relations Services, and has been so since 1978. He coordinates the activities of the Association's seventeen Employment Relations Officers, who are spread over six cities in the province. Mr. Anderson works out of the head office in Toronto, but still visits the other offices from time to time, although less frequently than in the past because of general staff meetings now held in Toronto. Mr. Anderson himself presents a portion of the Association's cases that go to interest arbitration, and handles certification matters before the Ontario Labour Relations Board. With respect to the Officers, Mr. Anderson in the Report describes his role generally as follows:

Generally, I'm responsible for the Employment Relations Officers. I have a role to play with respect to their hiring, I have a role to play with respect to discipline, discharge. I'm involved in their orientation program. I'm the one who is assigned to evaluate them. As far as negotiations are concerned I have somewhat of a co-ordinating function in that regard.

The report goes on, however, to better define these roles.

10. To begin with, the reference to "negotiations" is to the negotiations which the Association's Officers (or staff representatives) carry out with the various employers for whom the Association holds bargaining rights. Mr. Anderson explains that he is able to act as a central source in that respect. Regarding negotiations with the Association's own staff, Mr. Anderson could recall only one instance where he was consulted, and that was in a casual way, based on his experience with hospital collective agreements. As far as his hiring role is concerned, Mr. Anderson does not appear to have input into the initial decision that a vacancy

is to be filled, and he describes his role in the interviewing process which follows as “minimal” or “very minor”, although he has generally been a part of the consensus with regard to which individuals to hire. Regarding discipline, because the Officers function essentially as autonomous professionals, Mr. Anderson appears to get involved only when a complaint about an Officer is registered, either with him or with his superior, Marg O'Connor, the Senior Executive Officer, Operators. Mr. Anderson then interviews the individuals affected and prepares a report for Ms. O'Connor. Although there has been one instance where he was involved directly and recommended to Ms. O'Connor that a warning letter be given (which was done), he described his own role in these situations generally as that of “a fact-finder”. He has never himself disciplined anyone either orally or in writing. As an extension of this, he was asked:

In your own mind, though, have you spoken to an employee in the hope or expectation that he or she will change his behavior or whatever he's doing?

His answer was:

No, I can't say that those circumstances have come up or I can give you a specific example ...

As far as the orientation program is concerned, Mr. Anderson acknowledged that others in the bargaining unit play a role in that as well. He further acknowledged that the orientation program is presently the subject of a joint committee established under the collective agreement, and that he had no idea what was being done in that regard.

11. In addition to the areas mentioned, the Board notes that the question of work assignment has, according to Mr. Anderson, been left to the Officers to work out themselves. Where a problem *has* required his involvement, it appears he gives his approval only after speaking with Ms. O'Connor. The matter of vacation requests, Mr. Anderson acknowledges, is dictated by the collective agreement and Association policy. In the latter regard, a grievance has been filed, clearly not against Mr. Anderson himself, but against the policy which he has had to announce from his superiors. That policy in fact overrules Mr. Anderson's earlier handling of vacation scheduling. With respect to “compensating” time off (for overtime), the Officers, because of their flexible hours, appear to work this out on their own. Regarding job evaluations, Mr. Anderson indicates that he believes he ought to do evaluations of the officers, but adds that he has yet to do one.

12. It is not without significance that Mr. Anderson attended a meeting with legal counsel and members of management to discuss the Association's approach to discipline following the release of an arbitration award, but the Board does not find that this overrides its assessment of the evidence as a whole. Given the independent nature of the Employment Relations Officers' jobs, and, more importantly, the limited delegation of authority which appears, to date, to have taken place between Ms. O'Connor and Mr. Anderson, the Board is not able to conclude that Mr. Anderson has ceased to be an “employee” for the purposes of the *Labour Relations Act*. Mr. Anderson twice emphasized that his actual duties bore no relationship to his written job description, and presumably for that reason the applicant did not consider it useful to file the job description for this particular job with the Board. From the evidence, the Board does not perceive a conflict between Mr. Anderson's duties as he is performing them and his inclusion within the bargaining unit, and declares Mr. Anderson to be an “employee” for the purposes of the Act.

1853-81-U Canadian Union of Public Employees, Complainant, v. Sunnycrest Nursing Homes Limited, Respondent.

Duty to Bargain in Good Faith – Interference in Trade Unions – Unfair Labour Practice – Employer arranging for sub-contracts while bargaining ongoing – Not raising impending sub-contracts at bargaining table – Whether duty to disclose – Whether sub-contracts motivated solely by legitimate economic concerns – Whether Board directing re-instatement of displaced employees

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members, J. D. Bell and O. Hodges.

APPEARANCES: *J. Egner, R. Whitney and W. Lamoureux for the complainant; J. P. Sanderson, Q.C. and D. J. Forbes-Roberts for the respondent.*

DECISION OF THE BOARD; February 15, 1981

I- Evidence

1. This is a complaint under section 89 of the *Labour Relations Act*, arising from the respondent's decision to subcontract the work of, and terminate, one quarter of the approximately 60 employees in the bargaining unit represented by the complainant union.

2. The respondent is a nursing home owned and operated by Mr. M. LeRoy. The union was certified to represent the respondent's employees on October 24, 1980. On November 4, 1980, the union gave formal notice of its desire to bargain with a view to making a collective agreement. On December 3, 1980, at the respondent's request, the union submitted a complete package of proposals on both monetary and non-monetary issues, and pressed the respondent for an early meeting to discuss them. The union also sought further information about the existing employee classifications, rates, and seniority dates, so that it would be in a better position to assess both its own, and the respondent's bargaining position.

3. The parties met on February 3 and February 26, 1981. The discussion focused on the union's language proposals. There is no evidence of any specific counter-proposals advanced by the employer; however, Milton Graham, a consultant representing the respondent, did promise that the employer would submit its initial monetary offer on April 2, the scheduled date for the next meeting. This meeting was cancelled because of the illness of Mrs. H. G. Chalmers, the assistant-administrator for the nursing home, who was its other representative at the bargaining table.

4. Following the cancellation of the April 2 meeting, Russell Whitney, the union negotiator, contacted Graham in order to set further dates. April 28 was convenient for both parties, but Whitney was concerned about the slow course of negotiations, and indicated that he intended to make a formal application for conciliation in order to avoid any further delays. It had been more than five months since the union's certification, and in that time, it had made little headway in its effort to achieve a collective agreement. Since the employees had no right to strike (being prohibited from doing so by the *Hospital Labour Disputes Arbitration Act*), it was Whitney's view that the tempo of negotiations had to be maintained or they would simply drag on and on without any real progress being made. This has been Whitney's experience in other nursing homes, and was the reason why he wished to set the conciliation process in motion so that a conciliation officer would be available if needed. Graham advised Whitney

that if he (Whitney) intended to apply for conciliation, no useful purpose would be served by any further direct meetings.

5. In early April 1981, the union wrote to the Ministry of Labour requesting the appointment of a conciliation officer. By letter dated April 12, 1981, the respondent opposed the union's request on the ground that it was "unwarranted", "premature", and "circumventing collective bargaining". In the respondent's submission, it had not had an opportunity to fully respond to the union's language proposals; nor, because of the cancellation of the April 2 meeting, had it had the opportunity to present its monetary proposal to the union. The employer maintained that conciliation was unwarranted because there had been no serious delay, and, with "the cooperation of the union", it fully intended "to actively work towards a settlement".

6. Despite the employer's opposition, a conciliation officer was appointed and a meeting scheduled for June 2, 1981. By June 2, despite repeated reminders, the union had still not received a response to its request for information; and, notwithstanding Graham's undertaking and the respondent's letter suggesting that the submission of its monetary proposals had only been prevented by the cancellation of the April 2 meeting, the respondent now claimed that it needed more time to study the union's position (which it had had for six months) and to formulate a reply. The conciliation officer urged the respondent to prepare a reply on all outstanding issues. Whitney agreed that any "no board report" (i.e. a recommendation by the officer against the appointment of the Conciliation Board and a necessary pre-condition to arbitration) be withheld until June 16 to allow the employer to respond. The arrangement with the conciliation officer was that if the respondent's opening proposals were unacceptable, a "no board report" would issue, and the parties would then be free to continue negotiations, or proceed to arbitration if they were unable to compromise their differences.

7. On June 15, the respondent submitted its proposals, together with a letter from Graham indicating that he was prepared to meet at any time to discuss them. Those proposals were not immediately attractive to the union, and in early July, the conciliation officer issued his "no board report". In mid-July, Whitney contacted Graham to advise that the union was going to initiate the first step in the arbitration process (which could ultimately result in an arbitrated settlement), but he also indicated that he was anxious to pursue direct negotiations in an effort to achieve a settlement without resorting to arbitration. Graham, who had earlier said he was willing to meet at any time, now said there was no need.

8. In September 1981, the union submitted a further package of proposals with amendments to reflect some of the positions taken by the respondent, and a renewed offer to meet and bargain. Graham was contacted further in October and November 1981, and pressed for a response. Each time, he told Whitney that he had not had an opportunity to consider the union's amended position. An arbitration hearing to resolve the terms of a collective agreement is scheduled for February 1982.

9. There is no evidence that during the course of negotiations, there was ever any discussion of the union's monetary proposals or their potential impact on the respondent. There was no indication of the respondent's need, or intention, of subcontracting the work of employees in the bargaining unit. There was an item in the union's proposals which, according to Whitney, could be construed as restricting the employer's right to subcontract bargaining unit work; but, apparently, this item never figured in the parties' negotiations. Had the

respondent raised its concerns at the bargaining table, its subsequent actions would be a little easier to understand.

10. Mrs. Chalmers attended all of the bargaining sessions. She testified that the subcontracting alternative was being considered at the same time as the employer was bargaining with the union, and further that the respondent had had ample opportunity to raise the issue during bargaining. Mrs. Chalmers told the Board that she knew that the impending subcontracting arrangement would be of real concern to the union and the employees it represented, but, she said, she did not consider it necessary to raise the matter.

11. On November 24, 1981, without notice to the union, the respondent called a meeting of his housekeeping, laundry, maintenance and kitchen staff, and advised the employees that their work had been subcontracted to Parnell Foods, and L. and G. Housekeeping Services Limited, and that they were being terminated effective November 30, 1981. The employees were also advised that they would be considered for employment by the subcontractors. After the termination notices were handed out, representatives of the two subcontractors conducted interviews on the respondent's premises. As a result, many of the employees were hired (albeit with different terms and conditions of employment), and continued to perform the same functions very much as before. These functions were, and remained, unskilled and largely routine. L. and G. provides an onsite supervisor. Parnell does not. A representative of Parnell visits the home two or three times a week. The actual co-ordination of the kitchen staff is undertaken by the cook — as it was before.

12. Mrs. Chalmers, the assistant-administrator of the home, and Mr. LeRoy, its owner, both gave evidence about the decision to engage subcontractors. We did not find Mr. LeRoy a very credible witness. The subcontracts themselves were not produced in evidence, and LeRoy was evasive and reluctant to explain either the terms of those agreements or the previous rates which the home had paid to its staff when they were employed directly. Yet it was the terms of the subcontracts — as compared to the existing rates and the possibility of an increase through negotiation or arbitration — which according to LeRoy, figured in his decision to terminate his employees' services.

13. Mrs. Chalmers testified that Parnell Foods had approached the company in 1978, but there was no serious discussion of subcontracting food services until the spring of 1981 — that is, contemporaneous with the union's efforts to negotiate a collective agreement. Chalmers listed a number of reasons why the subcontracting was ultimately undertaken: the respondent's concern that it would have to retain a dietician on a part-time basis in order to comply with the Ministry of Health guidelines concerning the preparation of therapeutic diets; the impending retirement of one of the respondent's supervisors which would shift the supervisory burden to Mrs. Chalmers if the supervisor were not replaced; and, Mr. LeRoy's back problems. But is it difficult to accept that these were the primary reasons for the two subcontracts. Mrs. Shane, the supervisor who retired, had been ill periodically since 1979, yet the home had never regarded this as sufficient grounds for altering its work arrangements, and had made no effort to seek a replacement. No doubt the subcontracting arrangement relieved Mrs. Chalmers of some supervisory responsibilities, but as we have already noted, the Kitchen supervision remains unchanged, and the cleaning staff do not require much supervision. Mrs. Chalmers admitted that there were no specific complaints with respect to the housekeeping employees not doing their work, and she still does "rounds" to ensure that the work is being done to the home's satisfaction. The Ministry of Health guideline to which she

referred has been in effect since the spring of 1980. These regulations were being phased in, and there was no pressure or order from the Ministry of Health for immediate compliance. Similarly, Mr. LeRoy has had back problems for years, and since he can still work a regular day (so he testified), and is not involved in direct supervision of the employees, it is difficult to see how his back problems have much to do with the decision to subcontract his employees' work. While the home may have faced certain administrative problems, we do not think they explain the timing and manner of its subcontracting arrangements.

14. As owner and administrator of the home, it was LeRoy's decision to subcontract the housekeeping, laundry, kitchen and maintenance work, and to determine the employees performing those functions. He too cited his back problems, and the supervisory responsibilities of Mrs. Chalmers — although, in the latter case, it was not the supervisory burden with which LeRoy was concerned, but the absence of any "back up" should an illness recur. He also cited projected "cost savings" arising from the subcontracting arrangements. It is necessary to look at LeRoy's considerations in this regard in a little more detail.

15. LeRoy told the Board that the "cost savings" arise from a comparison between the union's monetary *proposals* (i.e. its opening demand which the company had had since December 1980, but about which there had been no negotiations), and the price charged by the two subcontractors. In the case of Parnell Foods, this price consists of a service charge of \$1000.00 per month, the *actual wage costs* paid by Parnell to its employees, and a percentage of the employee benefits paid by Parnell. In addition, a small portion of the "savings" arises from the bulk buying power of Parnell. The situation with L. and G. is unclear, because the agreement provides for a global fee, and LeRoy said he could not recall the breakdown. He also said he did not know the wage rates payable to Parnell employees (for which Sunnycrest will ultimately be responsible), or what the payment to Parnell would be for December 1981, the first and most recent month of the arrangement. Nor could LeRoy recall the rates which Sunnycrest had paid to its own employees for the same work. He did admit on cross-examination, however, that the respondent was paying *more* to L. and G. and Parnell than it had been paying to its own employees. How much more is uncertain because of the sketchy evidence concerning the previous wage rates and the sums payable to the subcontractors. Such evidence as there is, is almost entirely hearsay.

16. Chalmers testified that Parnell retained the same number of employees working the same number of hours, while L. and G. had the same number of employees working longer hours. Whitney told the Board that he had been advised that three individuals formerly employed by the respondent and now employed by Parnell had had a wage increase while three remained at the same wage rate, and all had received certain benefits not paid by Sunnycrest. It was his understanding that all of the L. and G. employees had suffered a wage cut. The only direct evidence is with respect to the cook, Lilian Norris, who was paid \$6.25 per hour by the respondent and now is paid \$7.81 per hour by Parnell. This represents a 25% increase over what the respondent previously paid, but of course, because of the arrangement with Parnell, it is a wage rate for which the respondent remains fully responsible. Thus the respondent is not only paying more for the subcontracting arrangement, as LeRoy admitted, but the only direct evidence suggests it is paying substantially more. It is clear moreover, that whatever the magnitude of the "cost savings" referred to by LeRoy, they were entirely "notional", being a comparison between the existing wage rates (whatever they were), and the union's opening bargaining position.

17. LeRoy testified that he had considered subcontracting his employees' work since the spring of 1981, and firmly decided to do so during the summer as a result of the above-mentioned calculations. Parnell had contacted the respondent some years before, and as it turned out, provided an acceptable alternative. According to Chalmers, L. and G. was approached and negotiations took place in the last week of August. The Parnell contract was agreed to in September, signed in November, and took effect on December 1, 1981. The L. and G. contract was finalized in October, signed in November, and also took effect on December 1, 1981. LeRoy testified that both contracts can be cancelled on notice and without penalty.

II — Argument

18. The union argues that the respondent's decision to subcontract the work of, and terminate, a substantial number of its employees, — taken unilaterally, without notice to their bargaining agent, and with barely a week's notice to the employees affected, — is a breach of a number of statutory provisions. The sections of the *Labour Relations Act* and the *Hospital Labour Disputes Arbitration Act* upon which the union relies, and to which we will refer, read as follows:

Labour Relations Act

- “ 3. Every person is free to join a trade union of his own choice and to participate in its lawful activities.
- 64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.
- 66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,
 - (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;...
 - (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.
- 70. No person, trade union or employers' organization shall seek by

intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

- 89(5) On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.

Hospital Labour Disputes Arbitration Act

10. Notwithstanding subsection 1 of section 70 of the Labour Relations Act, where notice has been given under section 13 or 45 of that Act by or to a trade union that is the bargaining agent for a bargaining unit of hospital employees to which this Act applies to or by the employer of such employees and no collective agreement is in operation, no such employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, and no such trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, until the right of the trade union to represent the employees has been terminated.

19. The union's argument has three related branches. The union argues first, that the subcontracting arrangement is a straightforward unfair labour practice designed to rid the respondent of a significant portion of those of its employees who have opted to engage in collective bargaining. Why else, asks the union, would the respondent pay *more* than its current rates for the services of the same employees, while at the same time avoiding any mention of subcontracting at the bargaining table, or any discussion of those employees' wage rates. The union acknowledges that, in appropriate circumstances, negotiated wage rates might prompt an employer to seek to minimize its costs by subcontracting, the introduction of technological change, or other means. But that is not the situation here. In this case, the respondent is purportedly reacting solely to the union's bargaining position, and without any effort to negotiate a wage rate within the employer's legitimate cost parameters. The evidence is that the decision to subcontract began to crystallize before the employer made any response at all to the union's wage proposals, and it has made no effort through bargaining to accommodate its economic concerns with the wage objectives of its employees. The union asks the Board to conclude that the respondent's real objective was to avoid the obligation to bargain collectively and to divest itself, insofar as it was possible to do so, of those employees who had opted for trade union representation. It could not discharge these employees directly, nor could it dispense with all of them, or completely replace the services they provide. But to the extent that it was able to do so, the respondent has accomplished precisely the same purpose by means of the subcontracting arrangement.

20. The union's second proposition is closely related to the first. The union argues that the respondent has failed to "bargain in good faith and make any reasonable effort to make a collective agreement". The union contends that the employer cannot be negotiating in good faith if, at the same time as it is bargaining with a view to setting the new terms and conditions of employment for its employees, it is settling the terms of a major subcontracting arrangement which will eliminate those jobs, or, as here continue them on different terms through the agency of a subcontractor. Can it be bargaining in good faith, asks the union, to tender a proposal which ultimately will have no application to many of the employees to which it ostensibly applies; or to jettison a quarter of the employees in the bargaining unit — purportedly because of the union's wage demand, — but without ever raising the subcontracting alternative or bargaining about the employees' wage levels? The union relies upon *Westinghouse* [1980] OLRB Rep. April 577, and argues that the respondent was under an obligation to reveal that it was undertaking initiatives which would significantly impact upon the bargaining unit (both those remaining and those facing termination), and make much of the previous bargaining nugatory. Without this information, the union argues, it was unable to assess its own priorities or formulate a meaningful bargaining response to matters of fundamental importance to the employees it represents. In the union's submission, the unilateral termination of one quarter of the employees in the bargaining unit, without notice or discussion, constitutes a repudiation of the collective bargaining process and a breach of the respondent's bargaining duty.

21. The union's final submission involves the so-called statutory freeze which prevails from the time the union gives notice to bargain until a collective agreement is in effect between the parties. The union submits that the freeze is an important adjunct to collective bargaining designed to preserve the labour relations status quo while that process is continuing. To eliminate a significant part of the bargaining unit fundamentally alters the status quo — especially when the decision is motivated by a union bargaining proposal rather than any external market conditions and, in the new arrangement, the work continues to be done by the same employees, very much as before, but on different terms and conditions. The employer is not here carrying on "business as before" or responding to economic exigencies in accordance with its established practice. On the contrary, argues the union, it is responding to the union and the collective bargaining process. In the union's submission, it would make nonsense of the concept of a "freeze" if an employer were prohibited from making minor adjustments in employee benefits (example: parking privileges — see *Scarborough Centenary Hospital* [1978] OLRB Rep. July 679 and [1979] OLRB Rep. Jan. 56), but remained free to significantly alter the composition and structure of the bargaining unit itself. And why have a statutory freeze at all if the employer need only to carry on "business as before" provided it is not motivated by anti-union animus? If the employer is free to change things that go to the heart of the collective bargaining relationship and process, the statutory freeze becomes meaningless.

22. The employer bases its position on its inherent management rights. It submits that it has the unfettered right to run its business as it sees fit unless or until its rights are circumscribed by the terms of a collective agreement. It had the right to subcontract the work of its employees before, and, in its submission, nothing in the statute changes that situation. With respect to the unfair labour practice allegations, the employer contends that it has bona fide economic and administrative reasons for divesting itself of the housekeeping, laundry, maintenance and food services aspects of its business. The respondent argues that there is nothing improper in an employer anticipating an arbitration award granting its employees a wage increase, and acting upon that expectation by subcontracting their work before such

award can issue. Finally, the employer argues that since it was exercising a pre-existing right to carry on its business, it was under no obligation to notify the union or bargain about either the exercise of that right or its consequences. Counsel for the respondent notes that, although the union is not permitted to call a strike, it can submit all of its concerns to an arbitrator.

23. It will be convenient to deal with these arguments in the order in which they were presented.

Interference With Statutory Rights

24. In this jurisdiction, the Legislature has mandated collective bargaining as a socially desirable means by which employees, through self-organization and collective representation, can participate in the determination of their terms and conditions of employment. To support this process, the *Labour Relations Act* proscribes various employer practices which could undermine the freedom of employees to select a trade union and engage in collective bargaining. The principal employer unfair labour practice provisions are set out in paragraph 18 above. These sections, together with the broad remedial authority granted to the Board, shore up the exercise of employee rights and protect freedoms which, without them, would be largely illusory. So important are these employee rights that the Legislature has considered it appropriate to cast a legal onus upon the employer to demonstrate that he has *not* interfered with their exercise. (See section 89(5).)

25. It is self evident, of course, that an employer can carry on his business as he sees fit, so long as he does not contravene a collective agreement or the applicable labour legislation. An employer is entirely free to expand or contract his enterprise, close down all or part of it, transfer operations, change the methods of production, or “contract out” work so long as in so doing, he is motivated by genuine business considerations, rather than a desire to defeat or impede his employees in the exercise of their statutory rights.

26. The onus cast upon an employer to demonstrate the propriety of its conduct has been succinctly stated by the Board in *The Barrie Examiner* [1975] OLRB Rep. October 745, at paragraph 17:

“...the appearance of a legitimate reason for discharge does not exonerate the employer, if it can be established that there also existed an illegitimate reason for the employer’s conduct.

This approach effectively prevents an anti-union motive from masquerading as just cause. Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts — first, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.”

It will be noted that the anti-union motivation need not be the sole reason for the employer’s decision. A contravention is also established in cases of mixed motives — some lawful, others unlawful. (C.f. section 382 of the *Criminal Code* R.S.C. 1970 Chap. C-34; and see: *R v*

Bushnell Communications et al (1973) 1 O.R. (2nd) 422 (O.H.C.), aff'd 4 O.R. (2d) 288 (C.A.); *Sheehan and Upper Lakes Shipping Limited et al* (1977) 81 D.L.R. (3d) 208; *Westinghouse Canada Limited* [1980] OLRB Rep. April 577 — application for judicial review dismissed, 80 CLLC ¶14,062 (Ontario Divisional Court).) The issue of motivation is decisive, and the Board must draw inferences and reach a conclusion on that issue in light of the established facts.

27. We do not think it is necessary to review the many Board cases in which the employer's conduct has been impugned because its decision-making — otherwise lawful — has been tainted by anti-union animus, an attempt to avoid its statutory obligations, or a desire to undermine the exercise of its employees' statutory rights. The cases are legion, and each, to some extent, turns on its own facts. It will be sufficient in our view, to refer briefly to several cases which, in various ways, resemble the instant one. As will become apparent, the situation here is by no means novel. Several previous Board decisions have involved business decisions not unlike those currently before us.

28. In *Academy of Medicine*, [1977] OLRB Rep. December 783, the Board found that an employer's decision to close its telephone answering service (one of a variety of services it provided to its clientele) "was motivated in whole or in substantial part by anti-union considerations" and was therefore an unfair labour practice. In that case, the employer, as it said it would, shut down a part of its operation because its employees had decided to join a trade union and participate in collective bargaining. In *Humpty Dumpty Foods Limited*, [1977] OLRB Rep. July 401, the Board found that an employer's decision to transfer its warehouse operation beyond the scope of the union's recognition and set up remote satellite warehouses to serve the same market was an unlawful lockout. It was "motivated by a desire to compel or induce its employees to refrain from exercising rights or privileges under the Act". In *Humber College of Applied Arts and Technology*, [1979] OLRB Rep. June 520, the Board found that an employer's decision to subcontract the work of its security guards was unlawful because its purpose was "to insulate itself from the natural and inevitable consequences of the exercise by the security guards of their right to strike". It was an attempt by the employer to avoid its obligation to bargain, and abrogate the employees' right to participate in the bargaining process. In *Consolidated Sand and Gravel*, [1978] OLRB Rep. March 264, a decision by a quarry operator to switch from a system of direct hiring of its drivers to one in which the drivers were assigned through a broker was found to be actuated by anti-union animus and "an attempt to ensure that the respondent would not be required to deal with its employees through a trade union". In *Westinghouse Canada Limited (supra)*, the Board found that a partial plant closure and relocation was motivated by anti-union considerations, and amounted to an unlawful refusal to continue to employ a number of its employees. In *Doral Construction Limited*, [1980] OLRB Rep. May 693, an employer's decision to subcontract the maintenance and security work performed by some of its employees, was found to have been induced, in part, by their decision to opt for trade union representation. The resulting decision to terminate the employees was held to be a breach of section 58(a) [now section 66(a) of the Act]. Finally, in *Dr. Hillers Peppermit Canada Limited*, [1979] OLRB Rep. May 375, an employer in the construction industry — where subcontracting is a common and accepted practice, was found to have engaged in a particular subcontract to impede its own employees in their efforts to join a union and bargain collectively. In each of these cases, therefore, an employer's "business" decisions were found to be illegal because they were motivated, in whole or in part, by a desire to avoid its statutory obligations, or frustrate the exercise of its employees' statutory rights. (See also: *C.A.L.E.A. and North Canada Air Ltd.*, [1979] 3 Can L.R.B.R. 239.)

29. In the instant case, the impact of subcontracting of the employees' bargaining rights is obvious. For one quarter of them, those rights were eliminated by their discharge. But was the subcontracting arrangement motivated by business considerations having their origin in the marketplace, or was it simply the means by which the respondent could rid itself, in part, of both its obligation to bargain collectively, and the employees who had opted to exercise that right? Bearing in mind the onus cast upon the respondent to demonstrate the propriety of its conduct, the Board was impressed by the absence of credible evidence to justify the timing and magnitude of its subcontracting decision.

30. This is a "first contract" situation. It is the first time the respondent's employees have sought to bargain collectively. It is also the first time that the respondent has sought to significantly change its method of operation by eliminating, through subcontracting, the jobs of a number of its employees. There is no past practice in this regard, and the business justification is at best very thin, for what, in light of its past history is a radical change in the respondent's method of carrying on business. We do not accept that Mr. LeRoy's back problems or Mrs. Chalmers' supervisory responsibilities provide an explanation for the respondent's decision. There is no credible evidence that the existing method of carrying on business was posing real problems for the respondent which warranted such an immediate and far reaching solution. Indeed, there is not even any evidence that the respondent's actual or potential labour costs were a major burden or seriously impinged on the business' profitability. Mr. LeRoy was unable to recall the rates he previously paid his employees, and he admitted that both subcontracting arrangements were *more expensive* than the previous method of operation. Not only does the respondent remain responsible for the wage costs payable by the subcontractors *in addition* to their management fees, but in the case of Parnell — the only subcontract about which there is clear evidence — the respondent has undertaken direct responsibility for a wage rate which, in one instance at least, is 25% higher than what Sunnycrest paid to the same employee, for substantially the same work. In the circumstances, it is difficult to accept a purely economic motivation for the respondent's decision, or resist the conclusion that it was trying to rid itself of as much of its unionized workforce as it could. This inference is reinforced by the fact that the decision was taken without any notice to the union whatsoever, and with really no effort to negotiate about the wage levels against which the efficacy of a subcontracting arrangement might be measured. Surely, if the union's bargaining posture posed a potential threat to the viability of the respondent's business, one would expect it to raise that matter at the bargaining table, and explore the possibility of accommodation. Instead, the respondent decided, in secret, to jettison a quarter of the bargaining unit's employees, and subcontract their work on terms which on the evidence may be more costly than the settlement which might have been achieved.

31. In the circumstances of this case, we cannot accept the employer's assertion that the decision to subcontract its employees work and discharge them, was motivated solely by legitimate economic concerns. On the contrary, we find that the subcontracting decision was actuated by a desire to avoid collective bargaining as far as it could, and subvert the bargaining process in which it was then engaged. Moreover, the secrecy and timing of the decision support the conclusion that it was made, and intended to be effective, before the statutory procedure which the employees were bound to follow could result in a collective agreement. We find that the respondent's decision to dispose of a number of its employees and their jobs, was taken in order to avoid its obligation to bargain collectively, defeat the statutory rights of those employees terminated, and provide a salutary example to its other employees of what could happen to them as a result of their decision to join a union. Indeed, it is difficult to imagine

conduct more drastic or more likely to have lingering iradicable effects on employees than the sudden elimination of a significant portion of their bargaining unit. We find that the respondent has breached sections 64, 66(a), 66(c), and 70 of the Act.

The Bargaining Duty

32. As we have noted above, this is not the first time in which a subcontracting arrangement has been held to be a device for avoiding statutory obligations or defeating employee rights. Nor is it the first time that the Board has had to consider the extent of an employer's obligation during bargaining to reveal decisions which significantly impact upon the employees in the bargaining unit. This issue was addressed at length, in *Westinghouse, supra*, where, as here, the Board had before it both a "standard" unfair labour practice complaint alleging a breach of sections 64, 66(a), 66(c) and 71 of the Act, together with a separate but related allegation of a failure to bargain in good faith.

33. *Westinghouse* involved an employer's decision to close part of its operation and relocate it beyond the scope of the union's jurisdiction. The Board found on the evidence that the employer's decision was motivated, in part, by anti-union considerations, and, on this basis, the unfair labour practice complaint was sustained. With respect to the bargaining complaint and the employer's bargaining duty, the Board had this to say:

"39. Collective bargaining during the prescribed "open period" is the preferred vehicle for establishing terms and conditions of employment in this jurisdiction. With the exception of union recognition and inter-union jurisdictional disputes the scope of matters which may be bargained to impasse in this jurisdiction, as contrasted to bargaining under the *National Labour Relations Act*, is virtually unlimited as is seen from the statutory definition of collective agreement. A collective agreement is defined in the Act as an agreement in writing containing provisions respecting terms and conditions of employment or the rights, privileges or duties of the employer, the employer's organization, the trade union or the employees and under section 14 of the Act the parties are required to bargain in good faith and make every reasonable effort to make a collective agreement. Once an agreement is reached, however, the parties are bound to it for its stipulated term and are prohibited from engaging in economic sanctions during its term regardless of changing economic conditions or management initiatives. The restrictions placed upon a trade union in this regard are to be contrasted with the freedom allowed under section 152 of the *Canada Labour Code*, C. L-1 which permits a trade union to bargain to impasse about the effects of technological change occurring during the term of a collective agreement. Having regard to the importance of the exercise, the requirement for full and open discussion, the scope of matters open to bargaining and the statutory framework which binds the parties to the terms of their agreement for its full term, can there be any doubt that the section 14 duty requires an employer to respond honestly when asked in bargaining if he is contemplating initiatives of the type which have a real likelihood of significantly impacting on the bargaining unit. Similarly, can there be any doubt that an employer is under a section 14 obligation to reveal to

the union on his own initiative those decisions already made which may have a major impact on the bargaining unit. Without this information a trade union is effectively put in the dark. The union cannot realistically assess its priorities or formulate a meaningful bargaining response to matters of fundamental importance to the employees it represents. Failure to inform in these circumstances may properly be characterized as an attempt to secure the agreement of the trade union for a fixed term on the basis of a misrepresentation in respect of matters which could fundamentally alter the content of the bargain.

40. The more difficult question is whether there is an obligation on the employer to reveal on his own initiative plans which are not finalized at the time of bargaining but which, if implemented during the term of the collective agreement, would have a significant impact on the economic lives of bargaining unit employees. On one side the Board must be concerned with potential distortion of the bargaining process by the imposition of an obligation which requires the employer to advise the union on his own initiative of plans which may never become decisions. On the other side, however, the Board must be sensitive to the purpose of the collective bargaining process and to the role of the trade union as exclusive bargaining representative of the employees who might be affected if these plans resulted in decisions being made by the company.

41. The competitive nature of our economy and the ongoing requirement of competent management to be responsive to the forces at play in the marketplace result in ongoing management consideration of a spectrum of initiatives which may impact on the bargaining unit. More often than not, however, these considerations do not manifest themselves in hard decisions. For one reason or another, plans are often discarded in the conceptual stage or are later abandoned because of changing environmental factors. The company's initiation of an open-ended discussion of such imprecise matters at the bargaining table could have serious industrial relations consequences. The employer would be required to decide in every bargaining situation at what point in his planning process he must make an announcement to the trade union in order to comply with section 14. Because the announcement would be employer initiated and because plans are often not transformed into decisions, the possibility of the union viewing the employer's announcement as a threat (with attendant litigation) would be created. If not seen as a threat the possibility of employee overreaction to a company initiated announcement would exist. A company initiated announcement, as distinct from a company response to a union inquiry may carry with it an unjustified perception of certainty. The collective bargaining process thrusts the parties into a delicate and often difficult interface. Given the requirement upon the company to respond honestly at the bargaining table to union inquiries with respect to company plans which may have a significant impact on the bargaining unit, the effect of requiring the employer to initiate discussion on matters which are not yet decided within his organization would be of marginal benefit to the trade union and could serve to distort

the bargaining process and create the potential for additional litigation between the parties. The section 14 duty, therefore, does not require an employer to reveal on his own initiative plans which have not become at least de facto decisions.”

34. The “open period” to which the Board referred in paragraph 39 of its decision, is the period following the giving of notice under section 14 or 53 of the Act. It is the giving of notice which triggers the obligation to bargain in good faith, and, unlike the situation in the United States, that bargaining duty is confined solely to the period preceding the making of a collective agreement. American law provides for an ongoing obligation to bargain about matters of concern to employees, which does not terminate, as in Ontario, by the actual signing of an agreement. In the United States, the bargaining obligation continues and extends to those issues not already covered by the parties’ agreement. In addition, in the United States, there is no absolute prohibition on the right to strike during the currency of a collective agreement, so that, within that framework, the parties can still resort to economic sanctions to resolve any bargaining impasse which may arise. In Ontario, in contrast, the bargaining obligation terminates with the signing of a collective agreement, and the statute forbids any resort to economic sanctions, for any reason, during the currency of a collective agreement. It should also be noted that the arbitral approach to subcontracting expressed in *Russellsteel* (1966), 17 LAC 253 (Arthurs) is now widely accepted so that once an agreement is signed, an employer acting for bona fide business reasons, remains free to subcontract bargaining unit work unless it is expressly prohibited from doing so by the collective agreement. Within this legal framework, therefore, it is of particular importance, from an employee perspective, to address and deal with any issue which may impinge upon the employment relationship during the term of the agreement. If such matters are not specifically dealt with, employees may find themselves prohibited from mounting a collective response to important employer initiatives touching on their job security.

35. The differences in statutory framework mean that one must exercise some care in the use of American jurisprudence; however, insofar as the bargaining duty is concerned, those differences only highlight the important role which section 15 must play in this jurisdiction in respect of the bargaining preceding a collective agreement. Once these negotiations are concluded, there is no further obligation to bargain until the end of that agreement (which will be at least a year away and is often longer), and throughout this period management initiative is fettered only to the extent that the previously negotiated agreement so provides. But the interests of employees in their livelihood and continued tenure of employment are not diminished. They may be vitally affected, and therefore particularly interested, in the employer’s business decisions.

36. It was these considerations, which prompted the Board in *Westinghouse* to stress its concern for the quality of bargaining during the open period, and conclude that an employer is under an obligation, on its own initiative, to reveal those decisions which will significantly impact its employees so that their union can respond to them at the only time when bargaining is legally required. In the Board’s view, the union should not be “kept in the dark” on matters of fundamental importance to the employees it represents. In the Board’s opinion, it would be tantamount to a misrepresentation and not conducive to orderly industrial relations if a union were induced to enter an irrevocable agreement for a fixed term without being advised of matters which could fundamentally alter the content of that bargain.

37. These general considerations are also relevant in the instant case, where employees

must bargain a first collective agreement with an unwilling employer, but unlike other employees of private businesses are forbidden from resorting to economic sanctions to buttress their bargaining position. The *Hospital Labour Disputes Arbitration Act* provides compulsory arbitration as the ultimate means for resolving any bargaining impasse. The employees have no right to strike, and as this case illustrates, the bargaining process can become protracted. In these circumstances, the Board must be especially careful to ensure that the employer has complied with its statutory obligations.

38. There is no doubt that the decision taken by the employer in the instant case falls within the parameters outlined by the Board in *Westinghouse*. The subcontracting decision directly affected one quarter of the workforce, and while the employees may have no absolute right to continued employment, their interest in their job security or tenure of employment is obvious. Employees are vitally and legitimately concerned about the way in which a necessary termination will be affected, the amount of notice given, the compensation payable on termination (if any), the right to exercise “bumping” rights in respect of jobs in other parts of the operation, etc. These are all issues which can be, and frequently are, dealt with in collective bargaining. Such matters are of interest to employees who remain as well as those who may ultimately, and, from the union’s point of view, the decision to eliminate one quarter of its members, and their jobs, strikes at the very root of the bargaining relationship — the bargaining unit itself. A mass termination simply cannot be equated with a decision to terminate individual employees. It is a decision affecting employees collectively, and it is in this context that we must decide whether the union should have been given reasonable notice and a fair opportunity to bargain about the subcontracting decision and its consequences.

39. The respondent employer asserts that notwithstanding section 15 or the ongoing bargaining process in which it was engaged, it was entitled to unilaterally eliminate the job opportunities of its employees, without notice or negotiations with their bargaining representative. We cannot accept this proposition. Even if the employer’s decision in this case were wholly free of anti-union animus, in our opinion, a decision, made during bargaining, to eliminate so many bargaining unit jobs should have been raised and discussed at the bargaining table. It is implicit in the employer’s obligation to bargain in good faith.

40. We do not think the duty to bargain about a major subcontracting decision imposes an unreasonable or unfair burden upon the employer involved. It does not unduly restrain him from formulating or implementing an economic decision to terminate a phase of his business operations, nor does it obligate him to yield to a union’s demand that the subcontract should not be let, or should be let on terms inconsistent with management’s business judgment. The duty to bargain is not an obligation to agree. It is a requirement to engage in a full and frank discussion with the employees’ representative, and make a bona fide effort to explore alternatives, if any, that may achieve a mutually satisfactory accommodation of the interests of both the employer and his employees. If such efforts fail, the employer remains free (absent other unfair labour practice considerations based upon anti-union animus) to go forward with his decision. But experience has shown that candid discussion about mutual problems by labour and management frequently result in their resolution with attendant benefit to both sides. A union confronted by a proposed loss of jobs can often make a useful contribution to the decision-making process. The recent bargaining in the automotive industry provides a good example. Business operations can profitably continue, and jobs may be preserved. And as professor Cox has observed:

“Participating in [collective bargaining] debate often produces changes

in a seemingly fixed position either because new facts are brought to light or because the strength or weaknesses of the several arguments become apparent. Sometimes the parties hit upon some novel compromise of an issue which has been thrashed over and over. Much is gained even by giving each side a better picture of the strength of the other's convictions. The cost is so slight that the potential gains easily justify legal compulsion to engage in the discussion."

(See: Cox, *The Duty to Bargain in Good Faith*, 71 Harv. Law Rev. 1401.) In our view, prior discussion of decisions of this nature is all that the Act contemplates. But it commands no less.

41. Apart altogether from the other unfair labour practices considerations which are present in this case, it is our view that the nature of the subcontracting decision and the business situation of the respondent amply illustrate the propriety of submitting that subcontracting decision to the mediating influence of collective bargaining. The respondent's subcontracting decision meets all of the *Westinghouse* parameters (i.e. a firm decision, rather than a contingency plan, which significantly impacts upon the bargaining unit); moreover, there is no evidence of any economic factors so compelling that bargaining itself would not alter them, and no indication that such bargaining would be futile. The respondent did not advance any reason why it could not raise the subcontracting issue at the bargaining table, nor is any such reason apparent to the Board.

42. In the circumstances of this case, and in addition to our other unfair labour practice findings, the Board finds that the respondent has failed to bargain in good faith and make every reasonable effort to make a collective agreement.

The Statutory Freeze

43. Like the statutory duty to bargain in good faith, a statutory freeze on working conditions is triggered by the union's notice to bargain. (See: section 79(1) of the *Labour Relations Act* upon which section 10 of the *Hospital Labour Disputes Arbitration Act* is modelled.) Broadly speaking, the freeze is intended to preserve the status quo during the interim period after the union's certification and the establishment of a collective bargaining regime, but before the parties have formally expressed their respective rights and responsibilities in a collective agreement. Accordingly, the freeze can be regarded as an adjunct to the bargaining process maintaining the status quo during bargaining in respect of those matters which can be dealt with in negotiations and the provisions of a collective agreement. (Note that the language of the freeze is framed in the same terms as the definition of a collective agreement.) The union complains that the respondent's subcontracting arrangement has improperly altered the status quo in that it was an unprecedented employer action taken in response to the union itself, and not part of the previous pattern of the parties' relationship.

44. The freeze provisions give rise to difficult problems of interpretation for if treated as a total prohibition on any employer actions taken in the ordinary course of business which impinge upon the employment relationship, the freeze would effectively paralyze the employer's operations during the bargaining process; while, if the preexisting but now frozen entrepreneurial rights are given too broad an interpretation, they would render the section meaningless. In the circumstances of this case, however, we do not consider it necessary to review the Board's jurisprudence in this area, or its attempts to accommodate the conflicting

interests embodied in the general language of the freeze provisions. (See: *Spar Aerospace Limited*, [1978] OLRB Rep. Sept. 859 and compare *Bank of British Columbia*, [1980] 2 Can. L.R.B.R. 441 and *Royal Bank of Canada*, [1978] 2 Can. L.R.B.R. 159.) Here, we have already found that the respondents subcontracting arrangements involves a contravention of a number of statutory provisions; and for the reasons set out *infra*, requires a restoration of the "status quo ante". It is therefore unnecessary to determine whether the respondent has also contravened the statutory freeze.

Remedy

45. Section 89(4) of the *Labour Relations Act* gives the Board a broad authority to fashion an appropriate remedy for any breach of the substantive provisions of the Act. In this regard, the legislative imprint has been lightly laid. Because of the dynamic context of labour relations, and the variety of factual patterns which it was expected would before the Board, the Legislature has not attempted to enumerate fixed remedies for each of the substantive violations committed. Nevertheless, it seems obvious that the Legislature did not intend to engage in the empty gesture of creating rights without parallel remedies. The obvious implication of the language of section 89(4) is that the Board should attempt to fashion relief which is adapted to the situation which calls for redress. (For a general discussion of the Board's remedial authority see: *Radio Shack*, [1979] OLRB Rep. Dec. 1220; applications for judicial review dismissed *sub nomine Tandy Electronics Ltd. v. United Steelworkers of America Ontario Labour Relations Board*, 80 CLLC ¶14,017, Ontario Divisional Court.)

46. It is axiomatic that remedial action, if it is to afford an effective redress for the commission of a statutory wrong, must be tailored to restore the person wronged to the position he would have occupied but for the action of the wrongdoer. Nothing less would effectuate the policies of the Act. In the case of employees who have been wrongly discharged, the Board typically orders that they be reinstated and made whole for any loss of pay or benefits suffered from the date of their termination until their reinstatement, and in addition, will usually require some affirmative action on the part of the employer — such as the posting of notices — in order to dispel the chilling effect on the exercise of statutory rights which the unfair labour practice may have caused. (See: *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254, *Fotomat Canada Limited*, [1980] OLRB Rep. Oct. 1397, *Radio Shack*, *supra*, and *Westinghouse*, *supra*, for examples of remedial orders fashioned by the Board and in the case of *Radio Shack* and *Westinghouse* approved by the Courts.) It is recognized that to accomplish the reinstatement of illegally terminated employees, the employer may well have to terminate replacements who have been hired or rescind business arrangements which flowed from or followed the unfair labour practice. Only when such action is taken however, can it be truly said that the wrong has been righted.

47. In our view, the situation is no different, and the need for a reinstatement remedy no less compelling, where an employer illegally subcontracts work performed by its employees and, in so doing, effects their termination. In both bases, the employees have been punished for exercising their statutory rights. The wrong is the same, and we can perceive no reason why the remedy should not be the same as well. In order to give effect to the reinstatement of his employees, the employer may be required to terminate his subcontract, but we do not believe such a requirement is unfairly imposed. But for the employer's breach of the Act, his employees would have remained in his employ.

48. We are reinforced in our view that reinstatement of the *status quo ante* is the only appropriate remedy in this case, by our separate but related finding that the respondent has breached section 15 of the Act. It would be an exercise in futility to attempt to remedy this kind of violation if the employer's decision to subcontract were to stand. No genuine bargaining over a decision to terminate a phase of its operations can be conducted where that decision has already been made and implemented. Nor would it make much sense to direct an employer to bargain with a union representing its employees over the termination of jobs which those employees no longer hold. The subsequent provision of a bargaining opportunity cannot cure the violation inherent in the elimination of unit work without notice or consultation. No meaningful negotiation could take place over a fait accompli, where the possible reinstatement of unlawfully terminated employees could be used by the employer as bargaining bait to induce acceptance of its terms. An order framed in this way would aggravate rather than cure the employer's delinquent bargaining conduct. Since the loss of employment stemmed, (in part), from their employer's unlawful action in bypassing their bargaining agent, we believe that a realistic bargaining order can be fashioned only by directing the employer to restore his employees to the positions which they held prior to their termination.

49. In summary therefore, even were we to find (which we do not) that the respondent had subcontracted its employee's work for reasons untainted by anti-union animus, the magnitude, nature, and timing of that decision, together with the absence of any countervailing economic or remedial considerations, would require a direction to abrogate its subcontract, reinstate the employees and bargain about its subcontracting decision with the employees' representative.

50. While we have found that, in the circumstances of this case, the respondent's subcontracting arrangement involved a breach of several provisions of the *Labour Relations Act*, we wish to reiterate our earlier observation that there is nothing improper in subcontracting per se, provided it is exclusively motivated by bona fide business considerations and, if undertaken during the course of bargaining, the employer complies with its section 15 obligations. In our competitive market economy, a trade union must be cognizant of the economic implications of its bargaining position, and if that position threatens the competitiveness profitability or viability of the enterprise, it should not be surprised if the employer seeks to preserve its competitive edge. Nor do we think the Legislature intended such bona fide business responses to be illegal practices under the *Labour Relations Act*.

51. For the foregoing reasons, and having regard to the totality of the evidence in this particular case, the Board makes the following remedial orders and directions:

- (a) The Board declares that the respondent has terminated a number of its employees contrary to section 64, 66(a), 66(c), and 70 of the *Labour Relations Act*,
- (b) The Board declares that the respondent has contravened section 15 of the Act in that it has failed to bargain in good faith and make every reasonable effort to make a collective agreement.
- (c) The Board directs that the respondent shall forthwith reinstate in employment all of the employees whom we have found were

unlawfully terminated, and compensate them for any wages or benefits lost as a result of their termination, together with interest calculated on the basis set out by the Board in Practice Note No. 13, dated September 8, 1980.

- (d) The respondent shall, subject to the dispute resolution procedures of the *Hospital Labour Disputed Arbitration Act* meet with the complainant union forthwith, and bargain with a view to concluding a collective agreement covering all of the individuals in the union's bargaining unit, including those reinstated pursuant to paragraph (c) above.
- (e) The respondent is directed to post without comment copies of the attached notice marked "Appendix A" after being duly signed by the respondent's owner, in conspicuous places at its place of business where they are most likely to come to the attention of the employees in the bargaining unit, and to keep such notices posted for 60 consecutive working days. Reasonable steps shall be taken to ensure that such notices are not defaced, altered, or covered by other material. Reasonable access to the respondent's premises shall be given to two representatives of the complainant union so that they can satisfy themselves that this posting requirement has been and is being complied with.
- (f) The respondent is directed at its own expense, to mail a copy of "Appendix A" to the residence of each of its employees.

52. The Board will remain seized of this matter should there be any difficulty in implementing its remedial orders.

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH BOTH THE COMPANY AND THE UNION HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE ONTARIO LABOUR RELATIONS ACT AND HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN OR HELP UNIONS TO BARGAIN AS A GROUP, THROUGH A REPRESENTATIVE OF THEIR OWN CHOOSING;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THE CANADIAN UNION OF PUBLIC EMPLOYEES AS THE CERTIFIED BARGAINING REPRESENTATIVE OF OUR EMPLOYEES.

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THE RIGHT OF OUR EMPLOYEES TO BARGAIN COLLECTIVELY AND TO EXERCISE THEIR RIGHTS UNDER THE ACT.

WE WILL REINSTATE INTO EMPLOYMENT AND COMPENSATE THOSE EMPLOYEES TERMINATED FROM OUR EMPLOY AS A RESULT OF THE SUBCONTRACTING OF THEIR WORK.

SUNNYCREST NURSING HOMES LIMITED

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

1941-81-R C.U.P.E., Local 43, Applicant, v. City of Toronto Non-Profit Housing Corporation, and Corporation of The City of Toronto, Respondents

Reconsideration – Related Employer – Union holding separate bargaining rights for outside workers of City and employees of corporation wholly owned by City – Union's request to consolidate bargaining of two units refused by employers – Whether related employer declaration appropriate to achieve consolidation – Whether authority to consolidate bargaining units implied in Board's power to reconsider

BEFORE: M. G. Picher, Vice-Chairman, and Board Members J. H. F. Ade and S. Cooke.

APPEARANCES: *J. Sack, Q.C., J. Mele and Les Kovacs for the applicant; R. Rae, John P. Sanderson, Q.C., Jane Forbes-Roberts and J. Palkenin for the respondents.*

DECISION OF THE BOARD; February 25, 1982

1. This is an application under section 1(4) of the *Labour Relations Act*. The applicant, C.U.P.E. Local 43, seeks a declaration that the Corporation of The City of Toronto and The City of Toronto Non-Profit Housing Corporation are a single employer for the purposes of the *Labour Relations Act*. It specifically requests the Board to order the respondents to bargain on the basis of a single unit, rather than in two bargaining units now held separately by the union.
2. The facts are not in dispute and are succinctly set out in the following statement appended to the application.

1. By an application dated February 10, 1981 the Canadian Union of Public Employees applied for Certification for all employees of the Respondent City of Toronto Non-Profit Housing Corporation save and except Property Manager and persons above the rank of Property Manager. An interim Certificate was issued following a Board Decision dated March 4, 1981. (See Board File No. 2436-80-R). A final Certificate was issued dated August 12, 1981.
2. The employees in the bargaining unit are employed in cleaning and maintenance of the residential buildings operated by the Respondent City of Toronto Non-Profit Housing Corporation (hereinafter Cityhome).
3. Once it has obtained bargaining rights for a group of employees, the standard practice of the Canadian Union of Public Employees (hereinafter C.U.P.E.) is to ask those employees to decide whether they wish to charter a new Local or to join a pre-existing Local. Where the employees decide they wish to join a pre-existing Local, C.U.P.E. requests the Local concerned to accept the employees into the Local and to bargain on their behalf with their employer.
4. Cityhome employees voted unanimously to request the Applicant

C.U.P.E. Local 43 (hereinafter Local 43) to accept them as members.

5. On June 23rd, 1981 the Executive of Local 43 voted unanimously to accept the Cityhome employees concerned as members of Local 43, on May 21, 1981.
6. By letter dated July 2nd, 1981 the Ontario Regional Director of C.U.P.E. notified R. M. Bremner, General Manager of the Respondent Cityhome, that the said employees have been transferred by C.U.P.E., to Local 43 and the Mr. L. Kovasci would conduct negotiations.
7. On August 23rd, 1981 Local 43 served the Respondent Cityhome with a written Notice of its desire to bargain.
8. The Applicant Local 43 represents certain employees of the Respondent City of Toronto (hereinafter the City).
9. The Respondent Cityhome is a corporation wholly owned and controlled by the Respondent City. Five of the nine directors of the Respondent Cityhome are members of City of Toronto Council. The President of Cityhome is Arthur Eggleton, Mayor of the City of Toronto.
10. In practice no distinction is made between employees of the Respondent Cityhome and employees of the Respondent City. Cityhome employees are supervised by City employees who are members of C.U.P.E. Local 79. City home employees are paid by cheque issued by the Respondent City. The said employees have recently had issued to them parkas with the words "City of Toronto" on them. The Property Managers, who supervise the employees of Cityhome, are paid by the Respondent City.
11. The Applicant has requested that negotiations concerning employees of the Respondent Cityhome be conducted between the Applicant and the Respondent City. The Respondents have refused this request.

3. In effect, the union which holds separate bargaining rights for the outside workers of The City of Toronto and for the caretakers employed by Cityhome, is now seeking by an application under section 1(4) of the Act to gain at the Board what it could not gain at the bargaining table and what it did not seek through a section 1(4) application which it might have made some years ago. The application calls into question the fundamental purpose of section 1(4) of the Act, which provides:

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board

may, upon the application of any person, trade union or council or trade unions concerned, treat the corporations, individuals, firms, syndicate or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

4. Section 1(4) of the Act was intended to protect established bargaining rights. Before it was enacted employers could by the establishment of separate corporate entities and businesses escape their bargaining obligations and erode the established bargaining rights of unions. (*Report of the Royal Commission of Labour Management Relations in the Construction Industry*, 1962 (The Goldenberg Report)). The Legislature enacted section 1(4) to protect against that outcome, giving the Board the discretionary power to treat related businesses as one for the purposes of collective bargaining. (*The Labour Relations Amendment Act, 1970, (No.2)*, S.O. 1970 c. 85 s. 2(6)). The section was not conceived as a provision by which the Board could effect the consolidation of established bargaining units. The consolidation power constitutes a significant instrument in the scheme and balance of any collective bargaining system. In our view it should not lightly be implied from a section with an obviously different purpose. Given the history of the Act and the expectations of the labour relations community of this province it would require clear language in the Act to confer such a power. Where the Legislature has considered that the Board should have the power to restructure established bargaining units it has granted that authority expressly. The authority of this Board, for example, to restructure bargaining units where there has been the sale of a business, is clearly and expressly conferred in section 63 of the Act. Similarly, when bargaining units were consolidated in the construction industry to permit province-wide bargaining by trade the consolidation was effected by the enactment of specific legislation (*The Labour Relations Amendment Act, 1977, S.O. 1977 c. 31*).

5. The union submits that the facts of this case fit the language of section 1(4) and that a more comprehensive bargaining structure would advance industrial relations purposes. It therefore urges the Board to be imaginative in the application of section 1(4) and to effectively order the merger of the two bargaining units for collective bargaining purposes.

6. While imagination has its value, so do consistency and fairness. The reality of collective bargaining expectations under the Act, and the expectation of the employer in this case, is that the bargaining unit struck during the certification process is the unit which, absent some other agreement, both the employer and the union have to live with for better or for worse. With that in mind the parties come to the certification proceedings prepared to marshal their evidence and arguments on the structure of the appropriate unit. Once the unit is settled, whether by the Board's decision or on the agreement of the parties, both union and employer are entitled to plan and administer their collective bargaining affairs on the basis of the bargaining unit established. While the Board has the power to reconsider its decision as to the composition of a bargaining unit while the certificate is outstanding and before a collective agreement is entered into, it would do so only for compelling reasons. It might, for example, reconsider where one party wishes to advance new evidence or argument which, by the exercise of due diligence, were not previously available to it.

9. The different approaches of the B.C. and Canada boards can be justified on institutional and historical considerations that do not apply in Ontario. Because certificates in the federal jurisdiction originally listed the categories of employees included in a bargaining

unit rather than describe the unit as “all employees save and except...”, there was no scope for natural accretion. As new job classifications became established it was necessary to update the certificate accordingly. In British Columbia, on the other hand, the jurisdiction to rationalize existing bargaining units stands on the legislative underpinning of that Board’s jurisdiction to establish councils of trade unions. Section 57 of the *B.C. Labour Code* gives the B.C. Labour Relations Board express authority to consolidate bargaining units, whether or not they are held by the same union and to establish a council of trade unions as bargaining agent for a consolidated unit. An integral part of the B.C. Board’s consolidation power is the express legislative authority to amend, extend, nullify or establish, in whole or in part, the terms of collective agreements as required in the circumstances. Those are powers which this Board does not have. We do not see, moreover, how such powers can be implied from the Board’s reconsideration power in light of the decision of the Supreme Court of Canada, unanimous on this point, that a Board certificate is spent once a collective agreement is entered into. (See, *Terra Nova Motor Inn Ltd. Supra*).

10. Apart from these legal and policy considerations, what are the equities of the case? In this case it was open to Local 43 to bring an application under section 1(4) of the Act when Cityhome was established in 1974, or at any time subsequent. It appears however, that the employees of Cityhome were left unrepresented from 1974 to 1981 while the union and the City discussed the issue off and on for seven years. The union also submits that delay was further occasioned by a change in the executive of the Local. We do not find that these are compelling reasons to excuse the union’s delay.

11. In essence the union, now having become the assignee of a Board certificate from C.U.P.E.’s national union is asking the Board to reconsider the certificate and merge the bargaining unit into something quite different from the unit that emerged from the certification process. It is plain that it doesn’t do so to protect its bargaining rights, but to augment its bargaining power in a way that it has been unable to do at the bargaining table. To grant the application would doubtlessly have the practical effect of automatically making the City contract the floor for negotiations involving the Cityhome employees. It is not clear to us why the Cityhome unit now, in effect, should be conferred by a section 1(4) declaration, all of the collective bargaining gains made over years of collective bargaining by the City employees. While it may gain that position by the exercise of its own bargaining power and its rights under the Act, we do not see why it should necessarily do so by fiat of this Board on a technical, *ex post facto* application of section 1(4).

12. It was at all times open for both Local 43 and the C.U.P.E. national to structure their applications and transactions in accordance with the Act and the Board’s rules and principles. It was equally open to the employer to reply to such applications as were made, and to gear its collective bargaining expectations and responses accordingly. In our view to exercise our discretion to issue a section 1(4) declaration in the fortuitous circumstances of this case would not only go beyond the purpose of the section, but would work a procedural and substantive prejudice to the employer.

13. For the foregoing reasons the application is dismissed.

1274-81-U; 1275-81-U; 1475-81-R; 1476-81-R; 1477-71-R; 1478-81-R
 Ottawa Typographical Union, Local 102, Complainant/ Applicant, v.
The Winchester Press Limited, 2Womor Publications Inc., Winchester
 Print (1981) Inc., Maxine Baldwin and Brian Raistrick operating under
 the business name of Winchester Print, Respondents.

Change of Working Conditions – Discharge for Union Activity – Practice and Procedure – Remedies – Unfair Labour Practice – Whether application on successor employer provision precluding application of related employer provision – Whether lay-off tainted by anti-union animus – Whether purchaser party to unfair labour practice – Whether purchaser's refusal to employ laid-off employee unlawful – Whether Board directing purchaser to reinstate employee to remedy predecessor's wrongdoing – Whether constructive notice to purchaser triggering statutory freeze

BEFORE: R. D. Howe, Vice-Chairman, and Board Members J. D. Bell and S. Cooke.

APPEARANCES: M. Cornish, David Brown, Richard Weatherdon, Donna MacNaughton, Ray Larsen and Robert Earles for the complainant/applicant; Stephen Workman and W. Reginald Workman for The Winchester Press Limited; Robbin B. Cumine and John Morris for 2Womor Publications Inc.; and James T. Heather and Tim Sargeant for Winchester Print (1981) Inc., and Maxine Baldwin and Brian Raistrick operating under the business name of Winchester Print.

DECISION OF THE BOARD; February 10, 1982

1. File No. 1274-81-U is a complaint under section 89 of the *Labour Relations Act* in which Ottawa Typographical Union, Local 102 (hereinafter referred to as the "Union") complains that it and the grievor Ray Larsen have been dealt with by The Winchester Press Limited (hereinafter referred to as "Press"), and by Winchester Print (1981) Inc., and Maxine Baldwin and Brian Raistrick operating under the business name of Winchester Print (hereinafter referred to as "Print") contrary to the provisions of sections 3, 64, 66, 70, and 79 of the Act. File No. 1275-81-U is a section 89 complaint in which the Union complains that it and the grievor Donna MacNaughton have been dealt with by Press and by 2Womor Publications Inc. (hereinafter referred to as 2Womor") contrary to sections 3, 64, 66, 70, 79 and 80 of the Act. File No. 1475-81-R is an application under section 63 of the Act in which the Union contends that 2Womor is the successor of Press by virtue of a sale of a business. File No. 1476-81-R is a section 63 application in which the Union contends that Print is the successor of Press by virtue of a sale of a business. File No. 1477-81-R is an application under section 1(4) in which the Union alleges that associated or related activities or businesses are or were carried on by Press and Print under common control or direction. File No. 1478-81-R is a section 1(4) application in which the Union alleges that associated or related activities are or were carried on by Press and 2Womor under common control or direction.

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3. At the commencement of hearing of these six matters, the Board, in the exercise of its discretion under Rule 81, directed that the six files be consolidated and determined the procedure that would be followed in the consolidated proceedings.

4. Counsel for Press, 2Womor, and Print agreed that Press had sold its newspaper business to 2Womor and had sold its printing business to Print. Accordingly, they were in agreement that section 63 of the Act was applicable to the transactions in question. However, they denied that section 1(4) was applicable and contended that their concession as to the applicability of section 63 precluded the Union from proceeding with its application under section 1(4). In response to those submissions, counsel for the Union indicated that her client was not satisfied that section 1(4) was inapplicable. She noted that the section 1(4) applications filed by the Union made it clear that the Union only requested relief under section 63 in the event that the Board declined to grant relief under section 1(4). It was her position that although the Board has a discretion as to whether or not to grant relief under section 1(4), that discretion can only be exercised after the Board has heard the application. Thus, she submitted that the Board has no discretion to refuse to hear a section 1(4) application. After recessing to consider the submissions of the parties, the Board ruled that it would hear the section 1(4) applications together with the other consolidated matters. It is not unusual for a trade union to request relief under section 1(4) and section 63 in the alternative. As reflected by the obligation imposed upon the respondents by sections 1(5) and 63(13) to “adduce at the hearing all facts within their knowledge that are material to the allegation”, information concerning most if not all of the details of such transactions lies within the peculiar knowledge of the respondents (see *Canada Cement Lafarge Ltd. and Point Anne Quarry Company*, [1977] OLRB Rep. Jan. 5; and *Guaranteed Insulation '77 Limited and Expert Insulation Limited*, [1981] OLRB Rep. Oct. 1394. If respondents could shield themselves from section 1(4) by merely asserting that section 63 was applicable, the efficacy of section 1(4) would be seriously impaired. It is questionable whether the Board had a discretion to decline to hear an application under section 1(4). However, assuming without deciding that such discretion does exist, the Board was (and continues to be) of the view that this was nevertheless an appropriate case in which to proceed to hear the section 1(4) applications, particularly in view of the remedial implications that section 1(4) declarations might have had with respect to the section 89 complaints. Accordingly, the Board called upon the respondents to fulfill their respective obligations under section 1(5) to adduce all facts within their knowledge material to the respective allegations that they are or were under common control or direction.

5. During the argument stage of these proceedings, counsel for the Union indicated that, having heard the respondents' evidence with respect to the section 1(4) applications, she was prepared to concede that there was no evidence before the Board that would support a declaration under section 1(4). She further indicated that she was prepared to join with counsel for the respondents in consenting to section 63 declarations.

6. By decision dated July 28, 1981 in File No. 0719-81-R (unreported), another panel of the Board, chaired by the present Vice-Chairman, certified the Union as bargaining agent for the following bargaining units that were agreed upon by Press and the Union:

“all employees of the respondent employed at 545 St. Lawrence Street in the Town of Winchester, Ontario, save and except Co-Publishers, President and persons regularly employed for not more than 24 hours per week” (“bargaining unit #1”);

“all employees of the respondent employed at 584 Main Street in the Town of Winchester, Ontario, save and except Co-Publishers, President and persons regularly employed for not more than 24 hours per week” (“bargaining unit #2”).

2Womor seeks to have the Board modify the description of bargaining unit #1 to read: "all employees of 2Womor Publications Inc. employed at 545 St. Lawrence Street in the Town of Winchester, save and except the President, Vice-President, editor, production manager and persons regularly employed for not more than 24 hours per week".

7. John Morris is the President and owner of 2Womor, which since September 1, 1981 has published the Winchester Press. He also publishes several other newspapers including the Prescott Journal, the Cardinal News, the Chesterville Record, the Tupper Lake Free Press and the United Counties Agrinews. His brother is the Vice-President of 2Womor and also has managerial responsibility for the Prescott Journal and the Cardinal News. Mr. Morris testified that although 2Womor does not yet have an "editor" for the Winchester Press, he plans to hire one in the future so that he and his brother do not have to be there every day. It was his evidence that the editors of his other newspapers have the power to hire, discipline and dismiss editorial staff and reporters, and also have budgetary responsibilities. However, the "news editor" presently employed by 2Womor in respect of the Winchester Press does not have such powers. It appears that 2Womor does currently employ a production manager at its Winchester operation. However, she was not called as a witness and the rather meagre evidence given by Mr. Morris concerning her duties and responsibilities does not indicate that she exercises managerial functions within the meaning of section 1(3)(b). The Union agrees to the exclusion of "President" and "Vice-President" but opposes the exclusion of "editor" and "production manager" at the present time.

8. Print seeks to have the Board modify the description of bargaining unit #2 to read: "all employees of Winchester Print at 584 Main Street West, Winchester, Ontario, save and except production manager, persons above the rank of production manager, office and sales staff, and persons regularly employed for not more than twenty-four hours per week". The Union agrees that it would be appropriate to exclude the co-owners (Maxine Baldwin and Brian Raistrick) from that bargaining unit but opposes the exclusion of production manager, and office and sales staff. It is unclear from the evidence whether Print presently has a production manager (other than co-owner Brian Raistrick, who appears to have overall responsibility for the operation) and no evidence was adduced concerning the responsibilities of that position. Nor was there any evidence that Print employs any office and sales staff other than co-owner Maxine Baldwin. Moreover, the exclusion of the two co-owners will leave only three persons in bargaining unit #2.

9. Section 63 of the Act provides, in part, as follows:

"63(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold *in the like bargaining unit* in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.

(4) Where a business was sold to a person and a trade union or council of trade unions was the bargaining agent of any of the employees in such business or a trade union or council of trade unions is the bargaining agent of the employees in any business carried on by the person to whom the business was sold, and,

- (a) *any question arises as to what constitutes the like bargaining unit referred to in subsection (3); or*
- (b) *any person, trade union or council of trade unions claims that, by virtue of the operation of subsection (2) or (3), a conflict exists between the bargaining rights of the trade union or council or trade unions that represented the employees of the predecessor employer and the trade union or council of trade unions that represents the employees of the person to whom the business was sold,*

the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (c) *define the composition of the like bargaining unit referred to in subsection (3) with such modification, if any, as the Board considers necessary; and*
- (d) *amend, to such extent as the Board considers necessary, any bargaining unit in any certificate issued to any trade union or any bargaining unit defined in any collective agreement.*

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(6) Notwithstanding subsections (2) and (3), where a business was sold to a person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and such person intermingles the employees of one of the businesses with those of another of the businesses, the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (a) *declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection (2);*
- (b) *determine whether the employees concerned constitute one or more appropriate bargaining units;*
- (c) *declare which trade union, trade unions or council of trade unions, if any, shall be the bargaining agent or agents for the employees in such unit or units; and*
- (d) *amend, to such extent as the Board considers necessary, any*

certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement.”
(emphasis added)

Different considerations are taken into account by the Board in determining bargaining units in applications under section 63 than are taken into account by the Board in certification applications since, except in special circumstances such as where an intermingling of employees has occurred, that section provides that the trade union continues to hold its bargaining rights “in the like bargaining unit”. Thus, in applying section 63 where there has been no intermingling of employees, “the Board must consider not only what would be an appropriate bargaining unit in a certification proceeding but also it must take into account, and in large measure be governed by, the scope of the bargaining unit already in existence” (see *The Oshawa Wholesale Limited*, [1975] OLRB Rep. Feb. 584). As stated by the Board in *City of Peterborough*, [1979] OLRB Rep. Feb. 133, at paragraph 13:

“The consistent point of departure in the decisions of the Board in applications under section 55 [now section 63] of the Act is a recognition that the primary purpose of the section is the preservation of employees’ bargaining rights upon the transfer of a business. The section protects employees of a transferred undertaking against automatically losing their union or seeing their bargaining rights transferred to a bargaining agent not of their choosing. Thus while the remedial scope of the section allows the Board to engage in an assessment of what is the appropriate bargaining unit the criteria to be applied are not identical to those which obtain in an application for certification of previously unrepresented employees. While the Board may have regard to all of the criteria that apply to that determination in certification proceedings it must also, having regard to the purpose of section 55, seek to balance the interests of the employees of the transferred undertaking and their union with the interests of both the employer purchasing the undertaking as well as the interests of that employer’s existing employees and their union. In the fashioning or amending of bargaining units under section 55 of the Act the Board must give effect to existing bargaining rights to the extent that those rights can be reasonably accommodated within the new employer’s administrative structures. (*Oshawa Wholesale Ltd.*, [1965] OLRB Rep. Feb. 504; *The Corp. of the City of Kitchener*, [1973] OLRB Rep. June 306; *Yarntex Perth, Division of Yarntex Corporation Ltd.*, [1975] OLRB Rep. Feb. 137).”

(See also *Parkwood Hospital*, [1980] OLRB Rep. May 759.)

10. Although the existing bargaining units in this case have not withstood the test of time by being incorporated into a succession of collective agreements, the Board is nevertheless of the view that they should not be lightly altered in the absence of compelling labour relations considerations. The issuance by the Board of the certificates in question in July of 1981 has created legitimate expectations on the part of employees in each of the bargaining units that they will be represented by the Union in collective bargaining with respect to their terms and conditions of employment. No compelling reason has been shown for excluding non-existent classifications. The Act provides a procedure under section 106(2)

whereby the Board can conclusively determine, *inter alia*, whether a person promoted or hired into a newly created classification is an employee within the meaning of the Act (see *Westmount Hospital*, [1980] OLRB Rep. Oct. 1572). Thus, if the parties are unable to resolve by agreement any such issue that may arise in future, the matter may be referred to the Board for determination in accordance with its normal procedures under section 106(2), which will permit a decision to be made in the light of appropriate evidence concerning the duties and responsibilities actually undertaken and performed by the person(s) in question.

11. Accordingly, having regard to all of the evidence and the submissions of the parties, the Board, pursuant to section 63(4) of the Act defines the composition of the like bargaining units as follows:

Bargaining Unit #1

All employees of 2Womor Publications Inc. employed at 545 St. Lawrence Street in the Town of Winchester, Ontario, save and except President, Vice-President, and persons regularly employed for not more than twenty-four hours per week.

Bargaining Unit #2

All employees of Winchester Print (1981) Inc., and Maxine Baldwin and Brian Raistrick operating under the business name of Winchester Print, at 584 Main Street West, in the Town of Winchester, Ontario, save and except co-owners, and persons regularly employed for not more than twenty-four hours per week.

12. Having regard to the agreement of the parties and all of the evidence adduced before us, the Board declares that a sale of a business from The Winchester Press Limited to 2Womor Publications Inc. occurred on or about September 1, 1981. The Union was therefore entitled to give notice to bargain to that successor employer pursuant to section 63(3) of the Act as it did on or about September 10, 1981. It follows from this declaration that the Union is the bargaining agent for the employees in bargaining unit #1 as set forth in the preceding paragraph of this decision.

13. Having further regard to the agreement of the parties and all of the evidence adduced before us, the Board declares that a sale of a business from The Winchester Press Limited to Winchester Print (1981) Inc., and Maxine Baldwin and Brian Raistrick operating under the business name of Winchester Print, occurred on or about September 1, 1981. The Union was therefore entitled to give notice to bargain to the successor employer pursuant to section 63(3) of the Act as it did on or about September 9, 1981. It follows from this declaration that the Union is the bargaining agent for the employees in bargaining unit #2 as set forth in paragraph 11 of this decision.

14. Having disposed of the applications under sections 1(4) and 63, we will now consider the section 89 complaints filed by the Union. The central thrust of those complaints is the alleged refusal by Press to continue to employ the grievors, Donna MacNaughton and Ray Larsen, the alleged refusal by 2Womor to employ or to continue to employ Donna MacNaughton, and the alleged refusal by Print to employ or to continue to employ Ray Larsen. The Union also alleges that the section 79 "statutory freeze" has been contravened.

15. Prior to September 1981, the Winchester Press had been a family owned and operated newspaper for many years. It enjoyed an excellent reputation in the newspaper business and was ranked as one of the best community newspapers in Canada. However, financial pressures, health problems of the owners and co-publishers, and the desire of their sons to leave the business for other pursuits led President W. R. Workman and co-owner R. G. Workman to advertise the business for sale nationally in the early summer of 1981.

16. The Workmans were unaware of any organizational activities by the Union until they received from the Board notice of the Union's application for certification on or about July 10, 1981. W. R. Workman testified that he was "quite surprised" by the application since he thought that he had always treated his employees "right" and had "never heard anything to the contrary". He conceded that he "wasn't delighted that the Union arrived." Mr. Workman's lack of delight is clearly indicated by the actions which he took shortly after he read the materials received from the Board in connection with the Union's certification application. Before posting the Form 5 Notice to Employees of Application for Certification, Mr. Workman held a captive audience meeting with his employees at which he asked if any of them had been in contact with anyone from the Union. At the meeting he clearly conveyed to employees that he was very upset and disappointed with their involvement in the certification application. He also told them that a nearby community newspaper that had recently entered into a collective agreement with the Union would likely "fold" within a year since it could not afford to pay the wages required by that agreement. He told the employees that the application "couldn't have come at a worse time" and also stated: "There are measures that I can take but I won't mention these at this time." After Mr. Workman left that meeting, his secretary Maxine Baldwin also expressed opposition to unionization. Later that day she called the employees together and circulated two documents which she had prepared, one being a list of specimen signatures for the Board and the other being an anti-union petition. She also invited employees to come to her office, that was adjacent to W. R. Workman's office, to sign the petition. At another employee meeting called during working hours on the following day, W. R. Workman's son Tom interrogated employees concerning who had contacted the Union and told them that his father was disappointed and hurt. He also said that legal action could be taken against employees who were lying about their involvement in the Union. Later that day, Tom Workman approached Ms. MacNaughton and asked why she had lied about having any meetings and contact with the Union. When she said, "Meetings? What Meetings?" he replied "Come on. You know what meetings I'm talking about. You were there." He also asked her who had labelled Ms. Baldwin as "office manager". W. R. Workman also approached at least one employee that day and told her that he had done favours for several people in the office and that he "needed one from [her] now". He also said, with obvious reference to the certification application, "This thing will break this business."

17. On the following Monday, W. R. Workman held a further captive audience meeting with employees, at which he told them that he was personally embarrassed by the application for certification because he was a former President of the Onatrio Community Newspapers Association (whose members are "relatively free of union representation"). At that meeting he "singled out" a number of individual employees upon whom he had previously bestowed certain unwritten personal benefits. He also indicated to employees that the company was losing money and held up a cash flow statement that he said showed a "paper deficit". He told employees that the certification application might "break up his business". He also told employees that the business was in the process of being sold and that a Union could jeopardize any possible sale.

18. In the reply which he filed with the Board in respect of the certification application, W. R. Workman listed the following "objections" to the application:

"1. The Winchester Press Limited has been in existence for nearly 100 years, more than 60 in association with the Workman family, operating with some success and a great deal of respect, and without a union.

2. Working conditions are generally excellent. Salaries are reasonable and are reviewed yearly with increases each year over the last five years ranging in the 10 per cent bracket. Benefits are numerous, but not listed in a contract.

3. At no time has there ever been a delegation of staff outlining discontent to management. The working arrangement between owner and employee is a one on one basis where consultation and not confrontation has been the rule.

4. The clandestine meeting of only a part of the staff with union representatives was unfair to other staff members who could not voice an opinion, deceitful and lacking principle in the manner in which it was held.

5. The Winchester Press has been a leader in its field because of a combination of good staff and good management. Both owners, R. G. Workman and W. R. Workman have taken active roles in the life of their communities and the province. R. G. Workman is a former deputy reeve of Winchester, Ontario, just one of the many offices he has filled. W. R. Workman is a former president of the Ontario Community Newspapers Association, a former executive member of the Board of Directors of Ontario Place and is currently a member of the Ontario Development Corporation. They have long been highly respected and honourable people, and they have operated The Winchester Press Limited with the same degree of integrity.

6. At the present time The Winchester Press Limited is in the process of being sold or at least in the process of determining a sale to a suitable buyer. The firm has been nationally advertised in both the Globe and Mail (June 23, 1981) and The Financial Post (June 27, 1981) and respondents to the advertisements are currently being reviewed by this firm and its accountants. We understand there have also been offers to purchase the printing end of the business. Until this time it was premature to mention that serious efforts would be made to sell all or at least a part of the business to some members of the staff, or to work out another arrangement with staff members if that were possible. Failing that and failing materialization of the sale, plans have been underway for more than a year to phase out the printing end of the business. The reasons for selling are numerous, but chief among them are the decisions of the Workman sons not to pursue their careers in the newspaper (family) business, and failing health on the part of both owners. It is felt

that efforts to unionize at this time could severely hamper any or all of these possible transactions, and could cause undue strain on the owners.

7. The split that has developed since notification of application has torn this office apart, a condition never before known to this business. It is a situation, unfortunately, that will take a long time to heal. Indeed, it is doubtful if the business will survive."

19. Stephen Workman who acted as counsel for Press also testified in his capacity as an officer (Vice-President Administration) of that respondent in these proceedings. He told the Board that he also served as counsel for Press in relation to the Union's application for certification and that he had been an officer of the corporation "since the certification process began". During cross-examination he advised the Board that prior to the scheduled date for the certification hearing, he received from Mr. Baldwin and other employees copies of employee petitions in opposition to the certification of the Union. After referring to a copy of a petition contained in his file, he told the Board, "I think my brother Tom Workman gave me the copy of it. Parties were aware that I was acting on behalf of [Press] so the parties gave me copies. I can't honestly say how they got into my files. I was aware that the petitioners were to appear [at the certification hearing]. I subpoenaed some of them . . . I wanted to be sure that they came to the hearing. I was aware that the Board didn't have to take into consideration the petitions unless they came."

20. Prior to the certification hearing scheduled in File No. 0719-81-R, the parties to the application met with a Board Officer, reached agreement on all matters in dispute among them and agreed to waive their right to a formal hearing. It was submitted on behalf of Press that the company's willingness to resolve that matter by agreement was inconsistent with the existence of anti-union animus on the part of its management. However, we infer from Stephen Workman's evidence during cross-examination that the "value judgment" that he made concerning the company's position with respect to the certification proceedings was primarily based upon his concern about the adverse effect which testifying and being subjected to rigorous cross-examination might have on his father's health. It appears that it may also have been based in part upon his concern that he had only been able to subpoena three of the petitioners because "the Board did not send [him] enough subpoenas". Thus, in the circumstances of this case, we do not find that the position ultimately adopted by Press in respect to the certification proceedings demonstrates that the anti-union attitude displayed by W. R. Workman after he became aware of that application, had ceased to exist by late July. Indeed W. R. Workman's testimony and demeanour during the present proceedings leave the Board with no doubt whatsoever that he continued at all material times to be very strongly opposed to unionization and other activities protected by the *Labour Relations Act*.

21. Ms. MacNaughton was hired by Press in April of 1976 as a paste-up artist after she graduated from St. Lawrence College where she majored in graphic design. In 1978 she accepted an offer to learn to be a display advertising salesperson for Press. Thus, she began to attend at various business to sell display advertising. She also continued to work in the paste-up room and to perform a number of other tasks for Press including proofreading parts of the paper, operating the headline machine, opaquing pages, "measuring the paper" (to determine the percentage of advertising, for postage purposes), doing the "dead ad" list, helping to collate the paper at the printing plant and occasionally taking orders for classified advertisements. At the request of W. R. Workman, she helped to train Karen Holmes to sell display

advertising in the early summer of 1981. Before that, Ms. Holmes, who was hired approximately one month after Ms. MacNaughton, had worked in paste-up, taken classified ads, worked on the compewriter, and done some clerical work in the front office.

22. Ms. MacNaughton was the employee who made the initial contact with Richard Weatherdon, a representative of the Union. After having three telephone conversations with him, she arranged to meet with him in Ottawa on June 24, 1981. Mr. Larsen accompanied her at that meeting at which they both signed Union cards. That evening, Ms. MacNaughton invited a number of Press employees to attend a meeting at her home to discuss unionization. She chaired the meeting and informed those in attendance of the steps that she had taken. A second meeting was held the following evening at Mr. Larsen's home where Mr. Weatherdon spoke to some of the Press employees. Ms. MacNaughton was one of the employees who attended the certification hearing on behalf of the Union.

23. As indicated above, on or about September 1, 1981, John Morris purchased the newspaper part of the business that had been operated by Press. Mr. Morris impressed us as a candid witness with a retentive memory, whose evidence we accept without hesitation or reservation. He has been in the newspaper business for approximately thirty years and has acquired a number of community newspapers over the years.

24. At least one of his newspapers (the Chesterville Record) has operated in competition with The Winchester Press for a number of years. In 1977 or 1978 Mr. Morris considered the acquisition of the Workmans' newspaper but did not have sufficient financial resources to do so. In early June of 1981, W. R. Workman contacted Mr. Morris and advised him that the paper was for sale. However, Mr. Morris told him that he was not interested because he had committed a large sum of money to an expansion program in Prescott. Near the end of July, Mr. Workman again contacted Mr. Morris and told him that his son (Tom Workman) was leaving the business and that he (W. R. Workman) and his brother "wanted out". Accordingly, he asked Mr. Morris if he would be interested in acquiring the paper "if the terms were very good". Mr. Morris, who was about to leave for vacation, agreed to contact Mr. Workman when he returned. Serious discussions with respect to the potential sale commenced on August 10, 1981 and culminated near the end of August in an agreement by Mr. Morris to purchase the newspaper aspect of the business.

25. Mr. Morris testified that he knew "right from the start" that the Union had applied for certification. During June of 1981, W. R. Workman telephoned Mr. Morris, a Director of the Ontario Community Newspaper Association, to ask if the Association had any resources available to assist him in determining how to respond to the application for certification that had been received by Press. Mr. Morris described Mr. Workman as being "pretty upset" about the application and "concerned about what to do". He told Mr. Workman that the Association did not have any such resources and advised him to "learn to live with it" and "get a good lawyer". Mr. Workman later informed Mr. Morris (near the end of July) that two bargaining units had been certified — a newspaper unit and a printing unit. Mr. Morris told the Board: "I was prepared to negotiate to purchase something where a certificate existed." He also testified that he was aware while he was negotiating to purchase the newspaper that he would likely have to bargain with the Union if he purchased it. He candidly admitted that the Union "was of some concern" to him since he had never dealt with a union before and was uncertain how it would affect his day to day operations. However, he also stated: "It certainly didn't scare me off."

26. Mr. Morris was also aware that Ms. MacNaughton was one of the employees who attended the certification hearing. In late July one of his employees in Chesterville (which is only six miles from Winchester) told him that it had been announced at a Labour Relations Board hearing in Toronto that he had purchased the Winchester Press. Mr. Morris, who at that time was merely in the early stages of considering a possible purchase of the newspaper, replied that he "certainly did not". Mr. Morris was very concerned about the rumour since it was his practice to personally announce any such expansions to his employees in order to assure them that their employment would not be adversely affected. He was also concerned that the Union not be given any misinformation. Accordingly, Mr. Morris was anxious to discover precisely what had been said in Toronto. He telephoned Allan Vanbridger, a sports reporter for Press (with whom he was acquainted as a result of sports information sharing between the papers and other personal contact) and was ultimately referred to Ms. MacNaughton who confirmed that it had been stated at the hearing in Toronto that he had purchased the paper. Mr. Morris surmised from this conversation that Ms. MacNaughton was one of the people involved with the Union but did not know what her role was. He also understood from talking with Mr. Vanbridger that several other employees had gone to Toronto for the certification hearing.

27. Near the middle of August, Mr. Morris, after completing a review of the newspaper's financial statements, gave W. R. Workman a list of the ten positions that he figured he would need to fill in order to operate the newspaper and asked Mr. Workman to pick the most versatile people for the positions because he "liked people who could do at least two and maybe three or four different functions in [his] operations". Included in the ten were one front office person and "one and one half ad sales people", because Mr. Morris was of the opinion that the "business wasn't big enough for two ad sales people".

28. W. R. Workman told the Board that prior to the closing of the sale he had to "narrow down the staff somewhat at the request of the purchasers". Consequently, they reviewed the list of employees and Mr. Workman gave Mr. Morris his evaluation of each of them with particular reference to their "value" to the business, "how they could back up" and "what role they play". Mr. Workman testified that Mr. Larsen and Ms. MacNaughton "were laid off primarily because of economics". It was his evidence that he did not know that Mr. Larsen was Union leader but he "probably thought that Ms. MacNaughton was" because "other people intimated that". In a display of greater candour, he subsequently told the Board: "I'd figured it out that [Ms. MacNaughton] was one of the leaders. I'd be a dummy if I didn't."

29. Mr. Workman testified that one of the three people in the sales area had to be eliminated. Although Ms. MacNaughton was the highest paid and most experienced in that area, he testified that he ranked her below Wanda Dolly and Karen Holmes, the other two employees in that area, because she was less flexible and versatile than they were. Nevertheless, he conceded that he had given her a salary increase (of \$300 or \$350 per year) when she requested an increase in May of 1981, in addition to the normal increase received by employees at the beginning of the year. According to Mr. Workman, after discussing and reviewing the list of employees, he and Mr. Morris agreed that Ms. MacNaughton should be "laid off". However, it is clear from the evidence that the decision to eliminate Ms. MacNaughton from the workforce was primarily W. R. Workman's and was based entirely upon his recommendation concerning her abilities, which recommendation the Board finds to have been influenced by W. R. Workman's anti-union attitude and his desire to penalize Ms. MacNaughton for the role that she played in unionizing his business. It is also clear that there

was no discussion between W. R. Workman and Mr. Morris concerning which employees were leaders or members of the Union, or concerning the role played by Ms. MacNaughton in the Union. Mr. Morris neither asked for, nor was given any indication concerning any of the employees' support for or involvement in the Union. Moreover, he did not request Mr. Workman to consider any such factors in recommending suitable employees to fill the positions that were available and we are satisfied he was not aware that Mr. Workman gave any weight to such factors in making his recommendations. We are also satisfied that Mr. Morris did not give any consideration to such factors in deciding whom to hire. Although he was aware at all material times that Ms. MacNaughton was a Union supporter, he was also aware that a large majority of the former employees of Press whom he hired were Union supporters. We are satisfied that Mr. Morris was not aware that Ms. MacNaughton played a greater role than other employees in organizational or Union activities. We are also satisfied that he decided not to hire Ms. MacNaughton because W. R. Workman recommended other employees as being more versatile, and that Mr. Morris, who accepted that as a *bona fide* recommendation, acted in good faith on the basis of Mr. Workman's recommendation.

30. After the sale of 2Womor was completed, the newspaper's display advertising sales were handled by Karen Holmes, who had only started to do display advertising work in April of 1981, and by Wanda Dolly, who had little or no experience in that aspect of the newspaper operation. Ms. Dolly was also called upon by the new owner to do paste-up work, at which she was also inexperienced. Due to her lack of experience, Ms. Dolly was less efficient than Ms. MacNaughton at paste-up and display advertising sales.

31. Having regard to all of the evidence before us, in the light of our assessment of the relative credibility of the various witnesses, we conclude that Ms. MacNaughton had more experience and was no less flexible than some of the employees who were not laid off by Press. That 2Womor would have benefited from her services if W. R. Workman had made Mr. Morris aware of her true abilities is evidenced by the fact that after purchasing the business, Mr. Morris hired a part-time employee to do "paste-up" two days a week. He did not offer that position to Ms. MacNaughton because he "understood that she did just advertising sales" and, accordingly, he "never thought of her". Moreover, Wanda Dolly, the Press employee who was employed by 2Womor to handle display advertising sales and paste-up, was less experienced and adept to such work than Ms. MacNaughton.

32. It is well-established in the Board's jurisprudence that in section 89 complaints in which it is alleged that an employer has refused to continue to employ a person because the person was or is a member of a trade union or was or is exercising any other rights under the Act, the employer must establish that the reasons given for the refusal to continue to employ the person are the only reasons and that those reasons are not tainted by anti-union motive. (See, for example, *The Barrie Examiner*, [1975] OLRB Rep. Oct. 745; *Poppe Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299; *Mount Forest Caskets Limited*, [1980] OLRB Rep. June 853; *B & S Furniture Manufacturing Limited*, [1980] OLRB Rep. May 745; and *Alpha Laboratories Inc.*, [1981] OLRB Rep. July 823.) For the reasons set forth above, the Board finds that Press contravened section 66 of the Act on August 27, 1981 by refusing to continue to employ Donna MacNaughton because she was a member of the Union who had played a substantial role in organizing her fellow employees. The actions of Press also contravened sections 64 and 70 of the Act. Before considering the appropriate remedial response to that illegal conduct, the Board will proceed to consider the other contraventions of the Act alleged by the Union.

33. As noted above, the Union has also alleged that the “lay-off” of Ray Larsen was a contravention of the Act and that Print contravened the Act by refusing to employ or to continue to employ Mr. Larsen after it purchased the printing plant portion of the business. Brian Raistrick, one of the co-purchasers of that aspect of the business, commenced employment with Press in 1957 and, during the course of his employment, “did everything except front office administration”. When he heard in August of 1981 that the business was for sale, he approached W. R. Workman to ask if it might be possible for him and Maxine Baldwin to purchase it. Ms. Baldwin was another long service employee who had “administered the Winchester Press office for 22 years”. Mr. Raistrick and Ms. Baldwin obtained professional advice from a lawyer and an accounting firm concerning the viability of the printing part of the business. Their professional advisers concluded that the expenses would be high with both Mr. Raistrick and Ms. Baldwin on the payroll. They suggested that since Mr. Raistrick, an experienced and capable printer, would be working full-time in the printing plant as one of its co-owners, one position should be eliminated because the business would not be able “to carry a high priced person” if Mr. Raistrick was also working full-time. (Prior to the sale, Mr. Raistrick had divided his time between work at the printing plant and work at the newspaper building.) Accordingly, the purchasers decided that Mr. Larsen, “who was the highest paid person in the [printing plant] group other than [Mr. Raistrick]”, would not be employed by Print. Mr. Workman agreed to “lay-off” Mr. Larsen and to be responsible for any severance pay to which he was entitled.

34. Having regard to all of the circumstances, including the fact that W. R. Workman was not at the time of the lay-off aware of the role that Mr. Larsen had played in the Union’s organizational activities, we are satisfied that anti-union animus did not form any part of the motivation for the lay-off of Mr. Larsen by Press. Moreover, although Mr. Raistrick was aware at all material times that Mr. Larsen was an active supporter of the Union, we are satisfied that Mr. Raistrick’s decision not to employ Mr. Larsen was based exclusively on *bona fide* economic considerations and was not tainted by anti-union animus. We are confirmed in that view by the fact that Mr. Raistrick had himself attended an organizational meeting and signed a Union card at Mr. Larsen’s home (although he subsequently signed a petition in opposition to the Union because he felt that signing a Union card after having been employed by W. R. Workman for twenty-five years was not an appropriate thing to do since he thought that Mr. Workman would be very disappointed in him). We are further confirmed in that view by the fact that Mr. Raistrick had always enjoyed a friendly working relationship with Mr. Larsen. Indeed, Mr. Raistrick, whom we found to be a credible witness, testified that if the business goes well, Mr. Larsen would “probably be the first person [he] would ask back because [he] has worked with Mr. Larsen and [knows] he can work”. Moreover, Mr. Raistrick was aware that he was purchasing a unionized printing business and that he would be required to bargain with the union.

35. Counsel for the Union also contended that the Press contravened section 79 by “laying-off” Ms. MacNaughton and Mr. Larsen. Although the evidence indicates that Press had only occasionally laid-off employees in the past, due to W. R. Workman’s concern for the well-being and continued employment of the individual members of his workforce, we are satisfied that the change of circumstances created by the impending sales of the two parts of the business to purchasers who did not need all of the persons employed by Press, created a situation in which Press could exercise its management right to lay-off employees in response to altered economic or business circumstances without contravening section 79 of the Act. The ability of Press to lay-off employees for *bona fide* business reasons was a “right, privilege or

duty of the employer” that was preserved by section 79 (see *Corporation of the Town of Petrolia*, [1981] OLRB Rep. March 261, and the authorities cited therein).

36. For the foregoing reasons, the Board finds that Press did not contravene any provision of the Act by “laying-off” Ray Larsen, and the Board further finds that Print did not contravene any provision of the Act by refusing to employ or to continue to employ Mr. Larsen.

37. Shortly after the sale of the newspaper had been completed on or about September 1, 1981, Mr. Morris initiated payment of O.H.I.P. premiums by 2Womor on behalf of all of its new employees. He also indicated to them that he would institute a dental plan, a pension plan and Blue Cross coverage. However, none of the benefits except the payment of O.H.I.P. premiums was implemented due to the Union’s objection that the introduction of such benefits without the consent of the union was prohibited by section 79 of the Act.

38. The Union does not seek an order from the Board directing 2Womor to cease paying employees’ O.H.I.P. premiums. Counsel for the Union advised the Board that her client is prepared to consent to the continuance of that employee benefit. However, the Union does seek, as a matter of principle, a declaration that 2Womor contravened section 79 of the Act by implementing the new employee benefit.

39. The Board is satisfied that Mr. Morris was not attempting to impair the Union’s bargaining rights by offering additional benefits to employees, but rather was merely proceeding in good faith to provide his new employees with the same benefits that the employees at all his other newspapers received. However, an employer’s action need not be tainted by anti-union animus to constitute a violation of section 79; the effect of that section is to prohibit, during specified intervals, alteration of wages and any other term or condition of employment, or any right, privilege or duty of the employer, the trade union, or the employees, without any reference to the motivation of the parties (see *Wellesley Hospital*, [1976] OLRB Rep. July 364, at paragraph 9).

40. The purpose of the section 79 “statutory freeze” is to preserve the status quo so as to provide a period of stability free from the disturbance of unilateral change during the sensitive period while the parties are entering into negotiations for a collective agreement. (See, for example, *Women’s College Hospital*, [1981] OLRB Rep. May 597; *Corporation of the Town of Petrolia*, [1981] OLRB Rep. March 261; and *A.E.S. Data Limited*, [1979] OLRB Rep. May 368.)

41. Counsel for 2Womor submitted that his client had not contravened section 79. He noted that under section 63(2) of the Act, the person to whom a business has been sold is only the “employer” for the purposes of a certification application where the sale occurs while that application “is before the Board”. It was his submission that no such application was before the Board on September 1, 1981, the date of the sale of business from Press to 2Womor, since the Union’s application for certification (File No. 0719-81-R) was disposed of by the Board on July 28, 1981. Thus, he submitted that the section 79(2) freeze did not apply to 2Womor since Press, not 2Womor, was the only “employer” to which that provision applied. He further contended that the section 79(1) freeze did not begin to operate until September 10, 1981 when the Union exercised its right under section 63(3) of the Act “to give the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective

agreement", which notice, by virtue of section 63(3) "has the same effect as a notice under section 14".

42. Counsel for the Union, on the other hand, contended that the statutory freeze began to operate when Press received notice of the application for certification and continued in operation at all material times without any "gap" resulting from the sale. She contended that 2Womor had "constructive notice" since, in her submission, 2Womor was aware that notice "was coming".

43. An argument similar to that presented on behalf of 2Womor with respect to the interplay between sections 63 and 79 was accepted by the Board in *Oxford Manor Rest Home*, [1980] OLRB Rep. Dec. 1786, in which the Board wrote:

"8. The first issue to be determined by the Board is whether in the present circumstances section 70(1) [now section 79(1)] of the Act was effective to preclude any alteration of the terms and conditions of employment by the respondent as of October 15, 1980 at which time the lay-offs were effected. A condition precedent to section 70(1) becoming effective in a given situation is that 'notice has been given under section 13 [now section 14] or section 45 [now section 53]' of the Act. It is clear that the complainant in the instant case had served no notice to bargain on the respondent as of October 15, 1980. It is also clear that following its certification, the complainant served notice to bargain on the then employer as of August 11, 1980. Consequently, section 70(1) was called into operation as of August 11th and effectively precluded, amongst others, changes in terms and conditions of employment from that date onwards. The question then before the Board is whether section 55 [now section 63] of the Act in some manner extends and continues 'the freeze' in effect immediately prior to the sale in such a way that the present respondent was bound on the critical date of October 15, 1980.

9. Section 55(3) is the relevant section in this regard and its reads:

'Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 13 or 45, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making the collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice section 13 or 45, as the case requires.'

In essence the trade union, such as in the instant case, continues 'to be the bargaining agent for the employees of the person to whom the business

was sold' and 'is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement'. Nothing in the section explicitly puts the new employer into the shoes of the previous employer so as to make all the rights and obligations relating to the collective bargaining relationship automatically attach to the new employer. The fact that the Legislature has specifically set out that the trade union shall continue to be the bargaining agent and shall have the right to serve notice to bargain on the new employer, militates against there being any additional rights or privileges from any notice to bargain which may have been served on the previous employer. This view is further fortified by an examination of section 55(2) which, in dealing with a sale of business while an application for certification or termination is before the Board provides, '... person to whom the business has been sold is ... the employer for the purposes of the application as if he were named as the employer in the application.' In this latter case where the Legislature intended that the new employer should fit precisely into the shoes of the previous employer it was explicitly said so. Had the Legislature similarly intended in section 55(3) we have no doubt it would have so said. Such a conclusion, in our view, is well within the rationale of the Board's decision in the case of *Hamilton Cotton Company*, [1964] OLRB Rep. July 190.

10. In our view, the notice to bargain served on the previous employer on August 11, 1980 effectively continued in effect the provisions of section 70(1) insofar as the then employer, up to the time of the sale of business, and the notice of October 28, 1980 similarly brought section 70(1) into operation on that date insofar as the respondent is concerned. During the period October 8, 1980 when the sale was made and on October 28, 1980 when notice was served on the respondent section 70(1) was not operative...."

(See also, generally, *Davidson-Walker Funeral Homes*, [1981] OLRB Rep. Oct. 1359. However, it does not appear that any argument concerning "constructive notice" was presented to the Board in that case. In *Owen Sound General and Marine Hospital*, [1978] OLRB Rep. Aug. 759, the Board applied the concept of constructive notice in the context of section 2(3) of the *Successor Rights (Crown Transfers) Act*, R.S.O. 1980, c. 489, which provides:

"Where an undertaking is transferred from the Crown to an employer and a bargaining agent has been granted representation rights under any Act and has given or is entitled to give written notice of desire to bargain to make or renew a collective agreement in respect of employees in the undertaking, the bargaining agent continues, until the Board declares otherwise, to be the bargaining agent in respect of the employees and is entitled to give to the employer written notice to desire to bargain to make or renew, with or without modification, a collective agreement, as the case requires."

In finding constructive notice to constitute notice under that provision, which is quite similar to section 63(3) of the *Labour Relations Act*, the Board stated, at paragraph 16:

"...By operation of section 2(3) of *The Successor Rights (Crown Transfers) Act*, 1977, OPSEU was entitled to give to the general hospital written notice of desire to bargain to renew the three agreements it was then re-negotiating with the Crown. It is clear from the evidence that at no time did OPSEU relinquish its claim to these bargaining rights. In these circumstances, therefore, the Board is prepared to find that OPSEU's conduct amounted to constructive notice to bargain upon the transfer of the undertaking. This notice, by operation of section 10 of *The Successor Rights (Crown Transfers Act)*, 1977, would have the same effect as the granting of representation rights or certification as bargaining agent, and would invoke subsection (1) of section 10 of *The Hospital Labour Disputes Arbitration Act*, R.S.O. 1970, c. 208, as amended, freezing the established pattern of the employment relationships of the persons falling within the OPSEU bargaining unit. This freeze would apply from the date of the transfer of the undertaking until this decision of the Board establishing rights for the new bargaining structure."

Unfortunately, that decision does not specify what was the precise "conduct" of the union in question which "amounted to constructive notice to bargain." See also *Re 380611 Ontario Ltd. (Colonial Tavern)* (1979), 23 L.A.C. (2d) 150, at page 156 (Adams) in which a Board of Arbitration wrote:

"Section 70 [now section 79] of the *Labour Relations Act* was pointed to by the union as a possible source of rights, but a careful reading of this section does not support this claim. Nowhere in this section are individual contracts of employment made binding on a person who purchases a business during the period when the vendor, as employer, is precluded from altering the rates of wages 'or any other term or condition of employment'. Thus, even assuming s. 70(1) can be construed as prohibiting the lay-off of employees during the period therein provided, there are no words that would encumber the new owner, obligating it to continue the employment of either active employees or employees on lay-off. In other words, the new owner cannot be considered to be an employer of the grievors within the meaning of this section. Indeed, for s. 70 to have any application to the new owner in the circumstances of this case, it would appear that notice to bargain must be served anew on the vendor in that s. 55(3) [now section 63(3)] provides that the union 'is entitled to give the person to whom the business was sold written notice of its desire to bargain'. But this is not to deny that the notion of constructive notice may have application in any particular case, although this concept was not urged upon the Board in the facts at hand."

44. It is unnecessary for the Board to determine in the present case whether "constructive notice" to the predecessor employer is sufficient to trigger the section 79 freeze following a sale of a business, because we are not satisfied that the Union engaged in any conduct that would amount to constructive notice. Moreover, the Union's consent, albeit belated, to 2Womor's introduction of employer payment of employer payment of O.H.I.P. premiums makes the issue essentially an academic one in the circumstances of the present case. The Board is satisfied that the benefit in question was not introduced by 2Womor for the

purpose of interfering with the formation, selection or administration of the Union or the representation of its employees by the Union. If that had been the purpose and effect of its actions, 2Womor would have contravened section 64 of the Act and the Board could grant section 89 relief regardless of whether a section 79 "statutory freeze" was or was not operative. Accordingly, even if 2Womor's introduction of that benefit had contravened section 79, no useful labour relations purpose would be served by granting a declaration to that effect based upon such a technical breach in the circumstances of this case in which 2Womor refrained from introducing any further benefits as soon as it became aware of the Union's opposition to same, and in which the Union and 2Womor are currently engaged in collective bargaining with a view to making a collective agreement.

45. It remains for the Board to determine the appropriate remedial response to Press' contravention of the Act through its refusal to continue to employ Donna MacNaughton. The Board's general response to an unfair labour practice of that sort is to direct the employer to reinstate the individual with full compensation for all lost wages and benefits sustained through the employer's violation of the Act, to pay interest on the compensation for lost wages (in accordance with the calculations described in Practice Note No. 13 dated September 18, 1980), and to post in conspicuous places on its premises a notice concerning the Board's disposition of the unfair labour practice proceeding (see, for example, *Mount Forest Caskets Limited*, *supra*, and *Alpha Laboratories Inc.*, *supra*). This is clearly an appropriate case in which to order Press to pay compensation (with interest) to Ms. MacNaughton. However, the extent of the compensation payable by Press may well be affected by the appropriateness or inappropriateness of other remedies such as a direction that 2Womor offer employment to Ms. MacNaughton.

46. Counsel for the Union sought to have the Board reinstate Ms. MacNaughton by directing 2Womor to employ her. In support of that position she contended that 2Womor acted together with Press to terminate Ms. MacNaughton because she was a Union leader, or that, at the very least, 2Womor was "a party to the offence by the Workmans". She referred the Board to section 21 of the *Canadian Criminal Code* by which a person who aids or abets another person to commit an offence is made a party to that offence. However, while we admire the resourcefulness of counsel in seeking analogies from other areas of the law, the Board does not find that provision, and the Jurisprudence that has developed under it, to be of assistance in resolving the present case since, as conceded by counsel during her submissions, the *Labour Relations Act*, which is the source of this Board's jurisdiction in the present case, does not contain an equivalent provision.

47. Counsel for the Union also contended that Mr. Morris authorized Mr. Workman to act as 2Womor's agent in terminating Ms. MacNaughton and that, therefore, 2Womor is responsible for what Mr. Workman did. However, assuming without deciding that an agency relationship was established, we agree with Mr. Cumine's submission that 2Womor is not responsible on the basis of agency principles for the contravention of the Act by Press because Mr. Workman clearly exceeded the scope of any actual authority vested in him by Press when, prompted at least in part by anti-union animus, he refused to continue to employ Ms. MacNaughton and thereby contravened the act. Moreover, there is no evidence that 2Womor or Mr. Morris represented to the Union, Ms. MacNaughton, or to anyone else, that Mr. Workman had any such authority; accordingly, there is no basis for binding 2Womor on the basis of apparent authority. (See, generally, *Bowstead on Agency* (14th ed. London: Sweet & Maxwell, 1976.)

48. Ms. Cornish suggested that to avoid contravening the Act, 2Womor was required to make an independent investigation and assessment of the respective abilities of the employees of Press. However, the Board is of the view that the Act does not require a purchaser to go that far. If 2Womor's refusal to employ Ms. MacNaughton had been tainted by anti-union animus, then it would clearly have contravened the Act. Moreover, if Mr. Morris had known that Mr. Workman's decision to lay-off Ms. MacNaughton was tainted by anti-union animus, 2Womor's refusal to employ her in circumstances wherein it employed each of the other persons formerly employed by Press in its newspaper unit (with the exception of an employee who had resigned) would in all likelihood have constituted a breach of the Act. However, as indicated above, we are satisfied on the evidence before us that 2Womor did not contravene the Act in the present case by refusing to employ Ms. MacNaughton. Accordingly, it remains for the Board to consider whether it would nevertheless be appropriate to direct 2Womor to "reinstate" Ms. MacNaughton to remedy its predecessor's unfair labour practice, the effect of which has been innocently perpetuated by 2Womor.

49. In its recent decision in *Sunnylea Foods Limited* [1981] OLRB Rep. Nov. 1640, the Board reviewed the Canadian and American jurisprudence concerning the power of labour relations tribunals to direct an innocent successor employer to remedy an unfair labour practice committed by the predecessor employer. As noted in that decision, the Ontario arbitral and judicial authorities which have held that a successor employer is properly subjected to grievances relating to the conduct of his predecessor, regardless of whether or not the successor had actual notice of the collective agreement and whether or not the arbitration proceedings were pending at the date of the sale, are heavily dependent of the wording of section 63(2) of the *Labour Relation Act* which provides as follows:

"(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business had been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application."

(See *Man of Aran* (1974), 6 L.A.C. (2d) 238 (Shime); *Woodbridge Hotel* (1976), 13 L.A.C. (2d) 96 (Brown); and *Cassin-Remco Ltd.* (1980), 105 D.L.R. (3d) 138 (O.H.C.)). Moreover, as further noted in *Sunnylea* (at paragraph 28), the somewhat similar approach that has been adopted by the Canada Labour Relations Board, and also by the British Columbia Labour Relations Board, with respect to unfair labour practice proceedings that had been commenced, or board orders that had been issued at the time of the sale, is not directly transferrable to Ontario since the sale of business provisions in those jurisdictions are worded quite differently from section 63(3) of our Act (as set forth earlier in this decision); section 53(1) of the *British Columbia Labour Code* expressly provides that the purchaser of a business is "bound by all proceedings under [that] Act before the date of the sale"; section 144(1) of the *Canada Labour Code* provides that the person to whom a business is sold generally "becomes a party to any proceeding taken under the [Industrial Relations Part of the Code] that is pending on the date on which the business was sold and that affects the employees employed in the business or their bargaining agent."

50. The National Labour Relations Board has adopted an analogous approach without the benefit of any statutory successor rights provision. In holding the predecessor and successor employers jointly and severally responsible to comply with the compensation and reinstatement order issued by the Board following the sale in unfair labour practice proceedings that were pending against the vendor at the time of the sale, the N.L.R.B. wrote as follows in *Perma Vinyl Corporation*, (1967), 164 N.L.R.B. 969:

“... To further the public interest involved in effectuating the policies of the Act and achieve the ‘objectives of national labor policy’, reflected in established principles of federal law, we are persuaded that one who acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair labor practice charges against his predecessor should be held responsible for remedying his predecessor’s unlawful conduct.

In imposing this responsibility upon a bona fide purchaser, we are not unmindful of the fact that he was not a party to the unfair labor practices and continues to operate the business without any connection with his predecessor. However, in balancing the equities involved there are other significant factors which must be taken into account. Thus, ‘It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace.’ When a new employer is substituted in the employing industry there has been no real change in the employing industry insofar as the victims of past unfair labor practices are concerned, or the need for remedying those unfair labor practices. Appropriate steps must still be taken if the effects of the unfair labor practices are to be erased and all employees reassured of their statutory rights. And it is the successor who has taken over control of the business who is generally in the best position to remedy such unfair labor practices most effectively. The imposition of this responsibility upon even the bona fide purchaser does not work an unfair hardship upon him. When he substituted himself in place of the perpetrator of the unfair labor practices, he became the beneficiary of the unremedied unfair labor practices. Also, his potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liability arising from the seller’s unfair labor practices.”

The principles outlined in the *Perma Vinyl* case were approved by the United States Supreme Court in *Golden State Bottling Company Inc.* (1973), 73 CCH ¶14,124; 84 LRRM 2839, wherein a successor employer purchased a business with knowledge of an outstanding N.L.R.B. order directing reinstatement of an employee dismissed by the predecessor employer for union activity. Included in the unanimous opinion of the Court is the following passage (at page 2845) which articulates some of the potential labour relations ramifications of a failure by the successor employer to remedy the predecessor employer’s unfair labour practices:

“When a new employer has acquired substantial assets of its predecessor

and continued, without interruption or substantial change, the predecessor's business operations, those employees who have been retained will understandably view their job situations as essentially unaltered. Under these circumstances, the employees may well perceive the successor's failure to remedy the predecessor employer's unfair labor practices arising out of an unlawful discharge as a continuation of the predecessor's labor policies. To the extent that the employees' legitimate expectation is that the unfair labor practices will be remedied, a successor's failure to do so may result in labour unrest as the employees engage in collective activity to force remedial action. Similarly, if the employees identify the new employer's labor policies with those of the predecessor but do not take collective action, the successor may benefit from the unfair labor practices. Moreover, the Board's experience may reasonably lead it to believe that employers intent on suppressing union activity may select for discharge those employees most actively engaged in union affairs, so that a failure to reinstate may result in a leadership vacuum in the bargaining unit...."

51. The strong legislative intent evident in section 1(2) of the Act that a person ought never to lose his employee status by reason of dismissal contrary to the Act combined with the broad wording of section 89(4) provides considerable support for the contention that this Board has the jurisdiction to direct a purchaser to reinstate an individual whose discharge was the subject of unfair labour practice proceedings that were pending before the Board at the time of the sale. However, none of the cases arising in other jurisdictions goes so far as to grant remedial relief against an innocent purchaser who is unaware of his predecessor's unfair labour practice at the time of the sale and in respect of which no unfair labour practice proceedings were pending at the time of the sale. It may not be unduly onerous to expect the prospective purchaser to determine if any unfair labour practice proceedings are pending against the party from whom he proposes to purchase a business and, if such proceedings are pending, to take into account their potential outcome, including his potential responsibility for providing some redress to the affected employee(s). It is quite another matter altogether to subject an innocent purchaser to remedial relief in respect of actions of the vendor that might constitute unfair labour practices but in respect of which no complaint has been filed with the Board by the time of the sale. It is simply not realistic to expect a prospective purchaser to investigate all of the vendor's actions that might possibly constitute unfair labour practices. To be meaningful, such an investigation would have to go beyond merely asking the vendor about his actions and obtaining from him a denial of any wrongdoing. A meaningful investigation would require the prospective purchaser to make extensive inquiries of the vendor's employees, which inquiries could well result in disclosure of information concerning union activities by various individuals and other information that the Board would not wish to encourage a prospective purchaser to obtain. Accordingly, even if the combined wording of sections 1(2) and 89 permits us to direct 2Womor to "reinstate" Ms. MacNaughton by offering employment to her, the Board is of the view that it would not be appropriate for us to do so in the circumstances of this case, although we would encourage 2Womor to voluntarily offer to employ Ms. MacNaughton in the next position that becomes available for which she is qualified.

52. Since the Board has determined that it would not be appropriate to direct 2Womor to reinstate Ms. MacNaughton, it is necessary to give serious consideration to the scope of the order that is to be made against Press for its contravention of the Act. In

granting relief to a grievor whom a respondent has refused to continue to employ in contravention of the Act, the Board attempts to make the grievor whole by fully compensating him or her for the financial loss that he or she has suffered through the employer's violation of the Act. See, for example, *Hallowell House Limited*, [1980] OLRB Rep. Jan. 35, at paragraph 28, in which the Board wrote:

"An employee who has been deprived of employment contrary to *The Labour Relations Act* suffers not only a loss of wages, but also a loss of the opportunity to use the money and have interest accrue on it. As this loss of interest is directly attributable to the employer's violation of the Act, it is appropriate that *in its effort to make an employee whole*, the Board direct the payment of interest on the wage loss."

(emphasis added)

See also *Sutton Place Hotel*, [1980] OLRB Rep. Aug. 1250, in which the Board stated: "The purpose of section 79 [now section 89 of the *Labour Relations Act*] is to put the grievor who has been wronged in as good a position as he would have been in if the respondent had not violated the Act."

53. A situation that is somewhat analogous to the present case arises when an employee is wrongfully dismissed by his or her employer in breach of his or her contract of employment and seeks damages through a civil action for breach of the employment contract. The courts, which have traditionally declined to direct reinstatement on the basis of perceived difficulties in specifically enforcing a personal service contract, generally award damages on the basis of breach of an implied term in the employment contract that reasonable notice of termination of the contract will be given. The measure of damages in such cases is the amount of income which the employee would have earned from his or her employer during the period of such reasonable notice, subject to a deduction in respect of any amount that the employee earned or should have earned by seeking alternate employment to mitigate his or her loss (see *Gardner v. Rockwell International of Canada Limited* (1975), 9 O.R. (2d) 105 (H.C.)). In determining what is reasonable notice in a particular case, the courts generally have regard to such factors as the character of the employment, the length of service of the employee, the age of the employee and the availability of similar employment, having regard to the experience, training and qualifications of the employee (see, for example, *Bardal v. The Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (O.H.C.), and *Ackerman v. Thomson and McKinnon, Auchincloss, Kohlmeier, Inc.* (1974), 4 O.R. (2d) 240 (C.A.)).

54. Although it is appropriate for the Board to derive some general guidance from the wrongful dismissal jurisprudence, it must not be overlooked that those cases are adjudicated on the basis of the traditional contractual principles associated with the "law of master and servant". While the refusal by Press to continue to employ Ms. MacNaughton in the present case may have been a breach of her employment contract, this Board's jurisdiction to grant remedial relief to Ms. MacNaughton is based not upon any breach of contract but rather upon contravention of a statute that embodies important aspects of public policy. As noted in its preamble, the *Labour Relations Act* was enacted "in the public interest of the Province of Ontario to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees." The collective bargaining regime for which the Act provides a framework of statutory support is fundamentally different from the

common law “master and servant” regime (see, generally, *McGavin Toastmaster v. Ainscough* (1975), 54 D.L.R. (3d) 1. (S.C.C.) and the authorities cited therein).

55. In *Academy of Medicine*, [1977] OLRB Rep. Dec. 783, the Board was called upon to determine the compensation to be awarded to twelve individuals whose employment was terminated by a closure of a division of the employer’s operation that was motivated by anti-union considerations. The Board, which found the employer’s conduct to be violation of several sections of the Act but declined (due to “obvious difficulties of enforcement”) to order the employer to re-open the division, directed the employer to pay to each of the employees a sum of money equivalent to the amount they would have earned during the three month period immediately following the date of closure (subject to an appropriate reduction for those employees who had found alternate employment during the period in question). Included in the Board’s consideration of the appropriate measure of damages is the following passage (at paragraph 50):

“Damages resulting from a loss of employment status cannot, of course, be measured with precision The Board must make its best estimate of the value of the employees’ loss in all of the circumstances of the case.”

56. Having regard to all of the evidence before us and the submissions of the parties, the Board finds that if Press had not contravened the Act, Ms. MacNaughton would in all probability have been gainfully employed indefinitely at the newspaper. Ms. MacNaughton had over five years’ experience at Press. She had no previous work experience prior to being employed by Press which hired her after she graduated from a three year diploma course at St. Lawrence College. There was no direct evidence concerning Ms. MacNaughton’s age but her work experience, educational background and appearance suggest to the Board that she is in her mid-twenties. The Board is satisfied that she was a conscientious and reliable employee who performed valuable services for the newspaper in a position with significant responsibilities. The evidence adduced before us establishes that as of November 27, 1981 (the date that she testified before the Board), Ms. MacNaughton’s efforts to obtain alternate employment had not met with success. (We make no finding as to the adequacy of those efforts since, in accordance with our normal practice, we have retained jurisdiction, on the agreement of the parties, to determine the quantum of compensation payable to the grievor pursuant to this decision). However, it may well be that 2Womor will find it appropriate to offer to employ Ms. MacNaughton in the next position that becomes available for which she is qualified. Moreover, Ms. MacNaughton suggested in her testimony that another newspaper may be prepared to consider employing her once these proceedings have been completed.

57. Having regard to all of the circumstances of this relatively unusual case, the Board has determined that Press must compensate Ms. MacNaughton for all lost wages and benefits sustained by her from August 28, 1981 to February 28, 1982, inclusive, with interest on the lost wages.

58. As noted above, part of the Board’s general remedial response to an unfair labour practice of the type committed by Press in the instant case, is to direct the employer to post in conspicuous places on its premises for the information of employees affected by the unfair labour practice, a notice of the Board’s finding of an unfair labour practice and of the actions to be taken by the employer to remedy its violation of the statutory labour laws (see *Valdi Inc.*, [1980] OLRB Aug. 1254). In recognition of the “chilling effect” which such unfair labour

practices may have on the exercise by other employees of their rights under the *Labour Relations Act*, the Board generally directs the employer to post such notice for the purpose of assuring those other employees that effective remedies exist under the Act to protect them in the exercise of their statutory rights. Such notification is particularly important in the instant case where it is uncertain whether Ms. MacNaughton will ultimately return to work with her former fellow employees at the newspaper.

59. For reasons similar to those set forth above in respect of the inappropriateness in the circumstances of this case of directing 2Womor to reinstate Ms. MacNaughton, and for the further reason that the posting of a Board notice on 2Womor's premises might lead employees, and other persons who attend at 2Womor's premises in connection with its newspaper business, to erroneously conclude that 2Womor has contravened the *Labour Relations Act*, the Board is of the view that it would also be inappropriate to direct 2Womor to post on its premises a notice with respect to the contraventions of the Act by Press. Accordingly, the Board finds this to be an appropriate case in which to effect such notice by direction Press to mail, at its own expense, a copy of the attached notice marked "Appendix", after being duly signed by W. R. Workman, to the residence of each person who was employed in the bargaining units set forth in paragraph 6 of this decision on August 27, 1981, the date of its unlawful refusal to continue to employ Ms. MacNaughton.

60. The Board therefore orders:

- (1) that Donna MacNaughton be fully compensated forthwith by the respondent The Winchester Press Limited for all lost wages and benefits sustained by her from August 28, 1981, to February 28, 1982, inclusive, as a result of that respondent's contravention of the Act;
- (2) that the respondent The Winchester Press Limited pay interest on the compensation for lost wages ordered by the Board, such interest to be calculated in the manner described in Practice Note No. 13, dated September 8, 1980; and
- (3) that the respondent The Winchester Press Limited, at its own expense, forthwith mail a copy of the attached notice marked "Appendix", after being duly signed by W. R. Workman, to the residence of each person who was employed by that respondent on August 27, 1981, in the bargaining units set forth in paragraph 6 of this decision.

61. The Board remains seized on this matter in the event that a dispute arises concerning the implementation of the Board's order.

Appendix

The Labour Relations Act

NOTICE TO EMPLOYEES

MAILED BY ORDER OF THE ONTARIO LABOUR RELATIONS BOARD

WE HAVE MAILED THIS NOTICE TO YOU IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH WE AND THE UNION PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY REFUSING TO CONTINUE TO EMPLOY DONNA MACNAUGHTON.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES,

TO FORM, JOIN AND PARTICIPATE IN THE
LAWFUL ACTIVITIES OF A TRADE UNION,

TO ACT TOGETHER FOR COLLECTIVE BARGAINING,

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF OUR FORMER EMPLOYEES THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES
WITH THESE RIGHTS.

WE WILL FULLY COMPENSATE DONNA MACNAUGHTON
FOR ALL LOST WAGES (PLUS INTEREST) AND
BENEFITS THAT SHE SUSTAINED FROM AUGUST 28,
1981 TO FEBRUARY 28, 1982, INCLUSIVE, AS A
RESULT OF OUR CONTRAVENTION OF THE LABOUR
RELATIONS ACT.

WE WILL MAIL AT OUR EXPENSE A COPY OF THIS
NOTICE TO THE RESIDENCE OF EACH PERSON WHO
WAS EMPLOYED BY US ON AUGUST 27, 1981, IN
THE TWO BARGAINING UNITS CERTIFIED BY THE
BOARD.

THE WINCHESTER PRESS LIMITED

PER: W. R. WORKMAN

PRESIDENT

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JANUARY 1982

BARGAINING AGENTS CERTIFIED

No Vote Conducted

0557-80-R: Ontario Nurses' Association, (Applicant) v. Oakwood Park Lodge, (Respondent).

Unit #1: "all registered and graduate nurses employed in a nursing capacity by Oakwood Park Lodge, in Niagara Falls, Ontario, save and except the director of nursing, those above the rank of director of nursing, and those persons regularly employed for not more than twenty-four (24) hours per week". (6 employees in unit).

Unit #2: "all registered and graduate nurses regularly employed for not more than twenty-four (24) hours per week in a nursing capacity by Oakwood Park Lodge, in Niagara Falls, Ontario, save and except the director of nursing, those above the rank of director of nursing". (4 employees in unit).

2285-80-R: Office and Professional Employees International Union, (Applicant) v. Kapuskasing District Roman Catholic Separate School Board, (Respondent).

Unit: "all office, clerical and technical employees of the respondent, save and except persons regularly employed for not more than 24 hours per week and persons employed at the administration (head) office of the respondent". (19 employees in unit).

0868-81-R: United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Fernway Construction Corp., (Respondent) v. Group of Employees, (Objectors).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (2 employees in unit). (*Do novo Hearing*).

1141-81-R: Commercial Workers Union, Local 486, (Applicant) v. La Cooperative Agricole D'Embrun Limitee, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees in the grocery division of the respondent at Embrun, Ontario, save and except Store Manager and persons above the rank of Store Manager". (41 employees in unit).

1378-81-R: Canadian Union of Public Employees, (Applicant) v. Clifton House for Boys, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except persons above the rank of child care supervisor, executive assistant to the executive director, bookkeeper, persons employed twenty-four (24) hours per week or less, and students employed during the school vacation period". (17 employees in unit). (*Clarity Note*).

1489-81-R: Ontario Taxi Association 1688 C.L.C., (Applicant) v. Maple Leaf Taxi Company, (Respondent).

Unit: "all owner-operators and drivers employed by the respondent at Toronto, Ontario, save and

except supervisors, persons above the rank of supervisor, multiple operators, dispatchers, and office staff". (41 employees in unit). (*Having regard to the agreement of the parties*).

1507-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Alka Forming Ltd., (Respondent).

Unit: "all employees of the respondent engaged in concrete forming on residential building projects in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foreman and persons above the rank of non-working foremen". (3 employees in unit).

1587-81-R: Canadian Union of Public Employees, (Applicant) v. South Muskoka District Association for the Mentally Retarded, (Respondent) v. Employee, (Objector).

Unit: "all employees of the respondent in Bracebridge, save and except Manager and persons above the rank of Manager, Bookkeeper, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (9 employees in unit).

1699-81-R: Canadian Union of Public Employees, (Applicant) v. The Sudbury and District Association for the Mentally Retarded, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in the Regional Municipality of Sudbury, save and except Executive Director, Program Directors, Program Managers, persons above the rank of Program Directors and Managers, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (81 employees in unit).

Unit #2: (*See Applications for Certification Subsequent to a Post Hearing Vote*).

Unit #3: (*See Applications for Certification Dismissed No Vote Conducted*).

1723-81-R: Service Employees Union, Local 478, (Applicant) v. Waldheim Nursing Home Ltd., (Respondent).

Unit: "all registered and graduate nurses employed by the respondent at Huntsville, Ontario, save and except the Director of Nursing, the Director of Nursing in Training and those above the rank of Director of Nursing, persons regularly employed for not more than 24 hours per week and persons covered under subsisting collective agreements". (6 employees in unit).

1910-81-R: Canadian Union of Public Employees, (Applicant) v. Saga Canadian Management Services Limited, (Respondent).

Unit #1: "all employees of the respondent at Laurentian University in Sudbury, save and except Food Service Director, Food Service Manager, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (17 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "*See Applications for Certification Subsequent to a Post Hearing Vote*".

1947-81-R: United Steelworkers of America, (Applicant) v. Mirlon Plastics Manufacturing Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent company in the Municipality of Metropolitan Toronto save and except foremen, persons above the rank of foreman, office and sales staff". (21 employees in unit). (*Having regard to the agreement of the parties*).

1948-81-R: Canadian Union of Public Employees, (Applicant) v. Corporation of the Township of Petawawa, (Respondent).

Unit: "all employees of the respondent in the Township of Petawawa, save and except the clerk, road superintendent and secretary to the clerk (assistant clerk)". (6 employees in unit). (*Having regard to the agreement of the parties*).

1950-81-R: International Union of Bricklayers and Allied Craftsmen Local #17 Peterborough, (Applicant) v. Stv. Riel Masonry Contractor, (Respondent).

Unit #1: "all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

Unit #2: "all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

1952-81-R: Amalgamated Clothing & Textile Workers Union, AFL-CIO-CLC, (Applicant) v. Levi Strauss Canada Inc., (Respondent).

Unit: "all employees of the respondent at its plant at 70 Easton Road, Brantford, save and except foremen, foreladies, persons above the rank of foreman and forelady, office, clerical and sales staff, quality control staff, mechanics, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (28 employees in unit). (*Having regard to the agreement of the parties*).

1954-81-R: Canadian Union of Public Employees, (Applicant) v. Palmerston Community Day Care Centre, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors and those above the rank of supervisor". (5 employees in unit). (*Having regard to the agreement of the parties*).

1956-81-R: Ontario Nurses' Association, (Applicant) v. Canadian Red Cross Society, Ontario Division — Red Cross Hospital, Haliburton, Ontario, (Respondent).

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent at Haliburton, Ontario, save and except nurse administrator, persons above the rank of nurse administrator and persons regularly employed for not more than 24 hours per week". (3 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all registered and graduate nurses employed in a nursing capacity by the respondent at Haliburton, Ontario regularly employed for not more than 24 hours per week save and except nurse administrator and persons above the rank of nurse administrator and persons above the rank of nurse administrator". (2 employees in unit). (*Having regard to the agreement of the parties*).

1957-81-R: Ontario Nurses' Association, (Applicant) v. District of Cochrane Homes for the Aged, (Respondent).

Unit: "all registered and graduate nurses employed by the respondent in a nursing capacity at Iroquois Falls, Ontario, save and except the Director of Nursing and persons above the rank of Director of Nursing". (7 employees in unit). (*Having regard to the agreement of the parties*).

1969-81-R: United Brotherhood of Carpenters and Joiners of America — Local Union 93, (Applicant) v. Alta Limitee, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman". (7 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except foremen and persons above the rank of non-working foreman". (7 employees in unit).

1970-81-R: Canadian Union of Public Employees, (Applicant) v. Essex Nursing Home, (Respondent).

Unit: "all employees of the respondent in the Town of Essex regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except registered nurses, supervisors, persons above the rank of supervisor and office staff". (51 employees in unit). (*Having regard to the agreement of the parties*).

1973-81-R: Service Employees' Union, Local 478, (Applicant) v. Waldheim Nursing Home Ltd., (Respondent).

Unit: "all employees of the respondent at Huntsville, Ontario, regularly employed for not more than twenty-four (24) hours per week, save and except registered graduate and undergraduate nursing staff, supervisors, persons above the rank of supervisor and office staff". (13 employees in unit). (*Having regard to the agreement of the parties*).

1994-81-R: Local Union 636 of the International Brotherhood of Electrical Workers, A.F.L. C.I.O. C.L.C., (Applicant) v. The Corporation of the Town of Milton, (Respondent).

Unit: "all employees of the respondent, in the Town of Milton, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and technical staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, students employed on a cooperative training program and persons covered by a subsisting collective agreement between the applicant and respondent". (37 employees in unit). (*Having regard to the agreement of the parties*).

1998-81-R: United Brotherhood of Carpenters and Joiners of America, Local 2222, (Applicant) v. Carl Reinhart, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

1999-81-R: Labourers' International Union of North America Local 506, (Applicant) v. Rock Engineering Construction Limited, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (2 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the

Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (2 employees in unit).

2006-81-R: International Association of Bridge, Structural and Ornamental Ironworkers Local 759, (Applicant) v. Jacobson Elevator Builders Limited, (Respondent).

Unit #1: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (8 employees in unit).

Unit #2: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (8 employees in unit).

2008-81-R: Canadian Union of Public Employees, (Applicant) v. The Durham Board of Education, (Respondent).

Unit #1: "all classroom assistants employed by the respondent in the Regional Municipality of Durham save and except supervisors, those persons above the rank of supervisor, persons covered by subsisting collective agreements and persons regularly employed for not more than twenty-four hours per week". (45 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (*See Applications for Certification Dismissed — No Vote Conducted*).

2012-81-R: Ironworkers District Council of Ontario, (Applicant) v. Metal Engineering Company, (Respondent).

Unit #1: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

Unit #2: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

2018-81-R: Canadian Union of Public Employees, (Applicant) v. Simcoe County Social Services, (Respondent).

Unit: "all employees of the respondent at Midhurst, Ontario, save and except field supervisors, office supervisor and persons above the rank of field supervisor and office supervisor". (22 employees in unit). (*Having regard to the agreement of the parties*).

2029-81-R: United Food and Commercial Workers International Union, Local 725, (Applicant) v. Mr. Greenjeans Corporation, (Respondent).

Unit: "all employees of the respondent in its restaurant at 120 Adelaide Street East in Toronto, save and except managers and persons above the rank of manager". (116 employees in unit).

2041-81-R: International Union of Operating Engineers, Local 793, (Applicant) v. Richard's Steel Ltd., (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

Unit #2: "all employees of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

2052-81-R: Millworkers Local #802 — United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Alphonse K. Laier, (Respondent).

Unit: "all employees of the respondent in the City of Windsor, save and except foremen, persons above the rank of foreman and office staff". (3 employees in unit). (*Having regard to the agreement of the parties*).

2062-81-R: Canadian Union of Public Employees, (Applicant) v. Township of Finch, (Respondent).

Unit: "all employees of the respondent in the Township of Finch, save and except roads superintendent and persons above the rank of roads superintendent". (4 employees in unit). (*Having regard to the agreement of the parties*).

2065-81-R: Ontario Nurses' Association, (Applicant) v. West Park Hospital, (Respondent).

Unit: "all registered and graduate nurses engaged in a nursing capacity by the respondent in Metropolitan Toronto regularly employed for not more than 24 hours per week, save and except head nurses and persons above the rank of head nurse." (75 employees in unit). (*Having regard to the agreement of the parties*).

2069-81-R: United Brotherhood of Carpenters and Joiners of America, Local Union 3054, (Applicant) v. Brubacher Cabinets, (Respondent).

Unit #1: "all employees of the respondent in Owen Sound, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (3 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees regularly employed for not more than twenty-four hours per week and students employed during the school vacation period save and except foremen, persons above the rank of foreman, office and sales staff". (2 employees in unit). (*Having regard to the agreement of the parties*).

2076-81-R: United Brotherhood of Carpenters & Joiners of America Local 1256, (Applicant) v. Curran Contractors Limited, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and person above the rank of non-working foreman". (5 employees in unit). (*Having regard to the agreement of the parties*).

2079-81-R: Christian Labour Association of Canada, (Applicant) v. Caressant Care Nursing Home of Canada Limited, c.o.b. as Caressant Care Nursing Home, (Respondent).

Unit: "all employees of the respondent at Lindsay, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except registered and graduate nurses, supervisors, persons above the rank of supervisor, and office and clerical staff". (30 employees in unit). (*Having regard to the agreement of the parties*).

2080-81-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. Mike's Supermarket Southern Ltd., (Respondent).

Unit: "all employees of the respondent at Elliot Lake, save and except assistant store manager, and those above the rank of assistant store manager". (43 employees in unit). (*Having regard to the agreement of the parties*).

2090-81-R: United Food and Commercial Workers International Union, Local 1000A, AFL-CIO-CLC, (Applicant) v. Panache Potisseurs Inc. operating under the name and style of St. Hubert Bar-B-Q, (Respondent).

Unit #1: "all employees of the respondent at Brampton, Ontario, save and except the manager, assistant manager, dining room manager, persons above those ranks, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period". (39 employees in unit).

Unit #2: (*See Applications for Certification Dismissed — No Vote Conducted*).

2098-81-R: International Brotherhood of Painters and Allied Trades — Local Union 1891, (Applicant) v. Star Light Painting Paper Hanging and Decorating Co., (Respondent).

Unit #1: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

Unit #2: "all painters and painters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (2 employees in unit).

2106-81-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC; (Applicant) v. M. & R. Fruit and Vegetables, (Respondent).

Unit: "all employees of the respondent in the City of Gloucester, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (11 employees in unit).

2143-81-R: International Brotherhood of Painters and Allied Trades Local Union 1891, (Applicant) v. Indu-Kote Systems Inc., (Respondent).

Unit #1: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-work foremen and persons above the rank of non-working foreman". (4 employees in unit).

Unit #12: "all painters and painters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (4 employees in unit).

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

1502-81-R: Employees' Association of Groves Park Lodge, (Applicant) v. 428378 Ontario Limited (Groves Park Lodge), (Respondent) v. Canadian Union of Public Employees, (Intervener).

Unit: "all employees of the respondent at Renfrew, Ontario, save and except professional and medical staff, registered and graduate nurses, undergraduate nurses, supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (40 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		30
Number of persons who cast ballots	23	
Number of ballots marked in favour of applicant	23	
Number of ballots marked in favour of intervener	0	

1789-81-R: International Union of Allied Novelty & Production Workers, Local 905, (Applicant) v. Canadian Atlas Furniture Mfg. Ltd., (Respondent).

Unit: "all employees of the respondent at Rexdale, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (137 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		127
Number of persons who cast ballots	116	
Number of ballots marked in favour of applicant	65	
Number of ballots marked against applicant	51	

1864-81-R: Canadian Union of Operating Engineers & General Workers, (Applicant) v. Blue Line Taxi Co. Limited, (Respondent) v. Ontario Taxi Association Local 1688, (Intervener).

Unit: "all employees of the respondent in Ottawa, Ontario employed as dispatchers, telephone operators, and shift supervisors, save and except operations manager and persons above the rank of operations manager, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (28 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		20
Number of persons who cast ballots	21	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	17	
Number of ballots marked in favour of intervener	2	

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

1699-81-R: Canadian Union of Public Employees, (Applicant) v. The Sudbury and District Association for the Mentally Retarded, (Respondent) v. Group of Employees, (Objectors).

Unit #1: (*See Bargaining Agents Certified — No Vote Conducted*).

Unit #3: (*See Applications for Certification Dismissed No-Vote Conducted*).

Unit #2: "all employees of the respondent in the Regional Municipality of Sudbury regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Executive Director, Program Directors, Program Managers persons above the rank of Program Director and Manager, and office and clerical staff". (13 employees in unit).

Number of persons on revised voters' list		12
Number of persons who cast ballots	6	
Number of ballots marked in favour of applicant	6	
Number of ballots marked against applicant	0	

1796-81-R: Energy and Chemical Workers Union, (Applicant) v. Resco Chemical and Colour Limited, (Respondent).

Unit: "all employees of the respondent in the City of Mississauga, save and except foremen, persons above the rank of foreman, office and sales and clerical staff, laboratory technicians, persons employed for not more than twenty-four hours per week and students employed during the school vacation periods". (18 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list		21
Number of persons who cast ballots	21	
Number of ballots marked in favour of applicant	12	
Number of ballots marked against applicant	8	
Ballots segregated and not counted	1	

1910-81-R: Canadian Union of Public Employees, (Applicant) v. Saga Canadian Management Services Limited, (Respondent).

Unit #1: (*See Bargaining Agents Certified — No Vote Conducted*).

Unit #2: "all employees of the respondent regularly employed for not more than twenty-four hours per week and students employed during the school vacation period at Laurentian University in Sudbury, save and except Food Service Director and Food Service Manager". (10 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		52
Number of persons who case ballots	29	
Number of ballots marked in favour of applicant	19	
Number of ballots marked against applicant	9	
Ballots segregated and not counted	1	

APPLICATIONS FOR CERTIFICATION DISMISSED —

No Vote Conducted

2472-79-R: Canadian Union of Operating Engineers & General Workers, (Applicant) v. Ontario Hydro, (Respondent) v. Canadian Union of Public Employees, Local 1000, Ontario Hydro Employees' Union, (Intervener).

0283-81-R; 0284-81-R; 0285-81-R: International Union of Operating Engineers, Local 793, (Applicant) v. E. C. King Contracting, a Division of Morcam Group Limited, (Respondent) v. Group of Employees, (Objectors).

0451-81-R; 0598-81-R: International Union of Operating Engineer Engineers, Local 793, (Applicant) v. E. C. King Contracting a Division of Morcam Group Limited, (Respondent) v. Group of Employees, (Objectors).

1046-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. A. & V. Carpentry, (Respondent).

1699-81-R: Canadian Union of Public Employees, (Applicant) v. The Sudbury and District Association for the Mentally Retarded, (Respondent).

Unit #1: (*See Bargaining Agents Certified — No Vote Conducted*).

Unit #2: (*See Bargaining Agents Certified Subsequent to a Post Hearing Vote*).

1733-81-R: International Brotherhood of Paintes and Allied Trades — Local Union 1891, (Applicant) v. Royal Decorating, Division of J. S. Decorators Limited, (Respondent).

1777-81-R: Local 47, Sheet Metal Workers' International Association, (Applicant) v. Metroheat Inc., (Respondent).

2008-81-R: Canadian Union of Public Employees, (Applicant) v. The Durham Board of Education, (Respondent).

Unit #1: (*See Bargaining Agents Certified — No Vote Conducted*).

2090-81-R: United Food and Commercial Workers International Union, Local 1000A, AFL-CIO-CLC, (Applicant) v. Panache Rotisseurs Inc. operating under the name and style of St. Hubert Bar-B-Q, (Respondent).

Unit #1: (*See Bargaining Agents Certified — No Vote Conducted*).

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

0839-81-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Black & Decker Canada Inc., (Respondent).

Unit: "all employees of the respondent at Brockville, Ontario, save and except foremen, persons above the rank of foreman, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (769 employees in unit).

Number of names of persons on list as originally prepared by employer		768
Number of persons who cast ballots	742	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	210	
Number of ballots marked against applicant	523	
Ballots segregated and not counted	8	

1277-81-R: Canadian Paperworkers Union, (Applicant) v. Lecours Lumber Co. Limited, (Respondent) v. Lumber and Sawmill Workers Union, Local 2995, of the United Brotherhood of Carpenters and Joiners of America, (Intervener).

Unit: "all employees of the respondent working at or out of its sawmill, planing mill and yard operations at Hearst, Ontario, save and except foremen, persons above the rank of foreman, and office and sales staff". (104 employees in unit). (*Clarity Note*).

Number of names of persons on revised voters' list		101
Number of persons who cast ballots	90	
Number of ballots marked in favour of applicant	8	
Number of ballots marked in favour of intervener	82	

1462-81-R: United Electrical, Radio and Machine Workers of America (UE), (Applicant) v. Magna International Inc., (Respondent).

Unit: "all employees of the respondent at its Rollstamp Plant in Richmond Hill, save and except foremen, those above the rank of foreman, office and sales staff". (115 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		115
Number of persons who cast ballots	111	
Number of spoiled ballots	2	
Number of ballots marked in favour of applicant	50	
Number of ballots marked against applicant	59	

1775-81-R: Service Employees Union, Local 204 Affiliated with A.F. of L., C.I.O., C.L.C., (Applicant) v. The Ontario Cancer Institute, (Respondent).

Unit: "all employees of The Ontario Cancer Institute at its Princess Margaret Hospital and Lodge in Metropolitan Toronto, Ontario, save and except professional medical and scientific staff, graduate nursing staff, undergraduate nursing staff, persons engaged in research work, paramedical personnel, supervisors, persons above the ranks of supervisor, office and clerical staff, security guards, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation periods". (293 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list		231
Number of persons who cast ballots	207	
Number of spoiled ballots	2	
Number of ballots marked in favour of applicant	89	
Number of ballots marked against applicant	112	
Ballots segregated and not counted	4	

1795-81-R: Milworkers Local #802 — United Brotherhood of Carpenters and Joiners, (Applicant) v. Arnold Manufacturing Ltd., (Respondent).

Unit: "all employees of Arnold Manufacturing Ltd. Windsor, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, security guards and students employed during the school vacation period". (53 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		52
Number of persons who cast ballots	49	
Number of ballots marked in favour of applicant	13	
Number of ballots marked against applicant	36	

1820-81-R; 1821-81-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Mason Villa (London) Limited, (Respondent).

Unit #1: "all employees of the respondent at London, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period save and except foremen, supervisors, persons above the rank of foreman and supervisor, professional nursing staff and office staff". (28 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		31
Number of persons who cast ballots	28	
Number of ballots marked in favour of applicant	11	
Number of ballots marked against applicant	16	
Ballots segregated and not counted	1	

Unit #2: "all employees of the respondent at London Ontario, save and except foremen and supervisors, persons above the rank of foreman and supervisor, professional nursing staff, office staff, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period". (25 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		22
Number of persons who cast ballots	20	
Number of ballots marked in favour of applicant	9	
Number of ballots marked against applicant	11	

1906-81-R: Hotel, Restaurant and Cafeteria Employees Union, Local 75, (Applicant) v. Whaler's Wharf Seafood Restaurants Limited, (Respondent).

Unit: "all employees of the respondent at 1885 Dundas Street East, Mississauga, Ontario, save and except supervisors, persons above the rank of supervisor, Maitre D. head chef, sales and accounting staff and students employed during the school vacation period." (33 employees in unit). (*Having regard to the agreement of the parties*).

Number of persons on list as originally prepared by employer		33
Number of persons who cast ballots	31	
Number of ballots marked in favour of applicant	7	
Number of ballots marked against applicant	24	

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

0206-81-R: United Steelworkers of America, (Applicant) v. H. G. Francis and Sons Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all of respondent's contractors working for the respondent in Ottawa". (57 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on list as originally prepared by employer		7
Number of persons who cast ballots	7	
Number of ballots marked in favour of applicant	3	
Number of ballots marked against applicant	4	

1689-81-R: United Steelworkers of America, (Applicant) v. Garrison Tool & Die Limited and Equine Forgings Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondents at Fort Erie, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, and persons regularly employed for not more than twenty-four hours per week". (11 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		10
Number of persons who cast ballots	10	
Number of ballots marked in favour of applicant	2	
Number of ballots marked against applicant	8	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

1147-81-R: Canadian Paperworkers Union, (Applicant) v. Lecours Lumber Co. Ltd., (Respondent) v. Lumber and Sawmill Workers Union, Local 2995, of The United Brotherhood of Carpenters and Joiners of America, (Intervener).

1932-81-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Brown Shoe Company of Canada Ltd., (Respondent).

1945-81-R: London and District Service Workers' Union, Local 220 SEIU-AFL-CIO-CLC, (Applicant) v. Coronet Motor Hotel, (Respondent).

1964-81-R: Labourers' Union of Canada (LUC), (Applicant) v. Blier Incorporated, (Respondent) v. Labourers' International Union of North America and Labourers' International Union of North America, Ontario Provincial District Council, (Intervener #1) v. Labourers' International Union of North America, Local 527, (Intervener #2).

2002-81-R: The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on behalf of Locals 1007; 1244; 1410; 1425; 1592; 1669; 1916 and 2309, (Applicant) v. Redirack Industries Limited, (Respondent).

2036-81-R: United Brotherhood of Carpenters and Joiners of America, Local 1256, (Applicant) v. 453087 Ontario Ltd. o/a Mar — D Contractors, (Respondent).

2091-81-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Libby McNeill & Libby of Canada Ltd. (Container Division), (Respondent).

2125-81-R: Service Employees International Union Local 268, (Applicant) v. The Lake Superior Board of Education, (Respondent).

SALE OF A BUSINESS

1240-81-R: International Brotherhood of Painters and Allied Trades, Local Union 114 and The Ontario Council of the International Brotherhood of Painters and Allied Trades, (Applicant) v. PPG Industries Canada Ltd., and Belleville Plate & Window Glass, the registered business style and name of Kingston Plate & Window Glass (#3) Ltd., (Respondents). (*Granted*).

1716-81-R: Teamsters' Local Union No. 230 Ready Mix Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers, (Applicant) v. Simcoe Block (1979) Limited, and Dufferin Materials & Construction Limited, (Respondents). (*Granted*).

1865-81-R: Canadian Paperworkers Union, Local 908, (Applicant) Coopers & Lybrand Limited, E.B. Eddy Forest Products Limited and The Bank of Montreal (Respondent). (*Withdrawn*).

2000-81-R: 101564 Ontario Limited, carrying on business as Central Tire, (Applicant) v. The International Union of Automobile, Aerospace and Agricultural Implement Workers of America, Local 27, U.A.W.-A.F.L. C.I.O.; and Central Chevrolet-Oldsmobile (London) Inc., (Respondents). (*Granted*).

UNION SUCCESSOR RIGHTS

1313-81-R: Canadian Union of Public Employees, (Applicant) v. Kirkland Lake Board of Education, (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1338-81-R: The Employees of Johanns Graphics Limited, (Applicant) v. Graphic Arts International Union Local 542, (Respondent).

Unit: "all employees of Johanns Graphics Limited, save and except Art Director, foremen and persons above the rank of foreman, office and sales personnel". (*Granted*).

Number of persons on list as originally prepared by employer		13
Number of persons who cast ballots	12	
Number of ballots marked in favour of respondent	0	
Number of ballots marked against respondent	12	

1369-81-R: Employees of Unilock Ltd., (Applicant) v. Christian Labour Association of Canada, (Respondent) v. T. Gain-Unilock Ltd., (Intervener).

Unit: "all employees of the employer at Paris, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff". (*Granted*).

Number of persons on list as originally prepared by employer		13
Number of persons who cast ballots	5	
Number of ballots marked in favour of respondent	2	
Number of ballots marked against respondent	3	

1537-81-R: William Gibson Manclark, (Applicant) v. Canadian Union of Operating Engineers and General Workers Local 101, (Respondent) v. Rank City Wall Canada Limited, (Intervener).

Unit: "all employees of Rank City Wall Canada Limited, at 2 Bloor Street West, save and except senior building systems operator, persons above the rank of senior building systems operator, building services supervisor, persons at the supervisor level or above, security, office and clerical personnel, persons employed for less than 24 hours per week and students employed during the school vacation period". (*Granted*).

Number of names of persons on list as originally prepared by employer		7
Number of persons who cast ballots	7	
Number of ballots marked in favour of respondent	1	
Number of ballots marked against respondent	6	

1543-81-R: Employees of Hoover Canada Inc. Hamilton Service Shop, (Applicant) v. United Electrical, Radio and Machine Workers of America (UE), (Respondent) v. Hoover Canada Inc., (Intervener).

Unit: "all service employees in the Stoney Creek Service Department, save and except foremen, persons above the rank of foreman, office, sales and clerical staff". (*Granted*).

Number of names of persons on revised voters' list		1
Number of persons who cast ballots	1	
Number of ballots marked in favour of respondent	0	
Number of ballots marked against respondent	1	

1781-81-R: Michael Mossaed, (Applicant) v. Local 280 of the International Beverage Dispensers' and Bartenders' Union of the Hotel and Restaurant Employees' and Bartenders' International, AFL, CIO, CLC, (Respondent) v. Sammy's Exchange Restaurant, (Intervener).

Unit: "all full-time and part-time male waiters in the employ of the intervener at Sammy's Exchange Restaurant Limited at the Toronto-Dominion Centre, save and except assistant manager and persons above the rank of assistant manager. (*Granted*).

Number of names of persons on revised voters' list		5
Number of persons who cast ballots	4	
Number of ballots marked in favour of respondent	0	
Number of ballots marked against respondent	4	

1809-81-R: Kenneth Robert Shank, (Applicant) v. Graphic Arts International Union Local 542, (Respondent).

Unit: "all bindery employees of W. L. Griffin Limited on December 21, 1981". (*Clarity Note*). (*Granted*).

Number of names of persons on revised voters' list		5
Number of persons who cast ballots	5	
Number of ballots marked in favour of respondent	0	
Number of ballots marked against respondent	5	

1892-81-R: William J. Weller, (Applicant) v. Canadian Paperworkers Union and its Local 1144, (Respondent) v. Beacon Envelopes, (Intervener).

Unit: "all employees of the employer at Downsview, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons employed for 24 hours or less per week, and summer students employed during the school vacation period". (*Granted*).

Number of persons on revised voters' list		19
Number of persons who cast ballots	16	
Number of ballots marked in favour of respondent	2	
Number of ballots marked against respondent	14	

1904-81-R: Essex Linen Supply, Windsor, Ontario, (Applicant) v. Laundry, Dry Cleaning and Dye House Workers' International Union, Local 351, (Union). (*Granted*).

1936-81-R: Norman Beal, (Applicant) v. Teamsters, Chemical Energy and Allied Workers Local Union 441, (Respondent). (*Dismissed*).

1992-81-R: Ena June Coles, Joanne Howard Ada Zimmerling, (Applicant) v. Retail Commercial and Industrial Union Local 206, Formerly Health Office and Professional Employees, Local 1976, (Respondent). v. W. Frank Real Estate Limited, (Intervener). (*Withdrawn*).

2028-81-R: Domestic Panucci, (Applicant) v. Teamsters Local Union No. 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Respondent) v. Darrigo's Supermarkets Ltd., (Intervener). (*Granted*).

2042-81-R: Consolidated-Bathurst Packaging Limited, (Applicant) v. Canadian Union of Public Employees and its Local 101, (Respondent). (*Granted*).

2086-81-R: Chapples Limited, (Applicant) v. Retail Clerks Union, Local 409 Chartered by Retail Clerks International, CLC-AFL-CIO, (Respondent). (*Withdrawn*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

2212-81-R: Ontario Food Division of The Oshawa Group Limited, (Applicant) v. Retail, Wholesale & Department Store Union, Local 414, J. Fuller, P. Short, I. Sawchyn, M. Studley, D. Harkies, R. Maltby, R. Brough, B. Brummel, (Respondents). (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE CONSTRUCTION INDUSTRY

2174-81-U: Lormark Construction, (Applicant) v. Drywall, Acoustics, Lathing & Insulation Local 675, United Brotherhood of Carpenters and Joiners of America and William Johnston, (Respondent). (*Withdrawn*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

2063-81-U: Christian Labour Association of Canada, (Applicant) v. Sun Ray Solar Systems Limited, (Respondent). (*Withdrawn*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1752-80-U: Gary Robert Walsh, (Complainant) v. Local 43, The Canadian Union of Public Employees, (Respondent). (*Withdrawn*).

2539-80-U: Stanley J. Dalton, R.N.A., (Complainant) v. Bloorview Childrens Hospital, (Respondent). (*Dismissed*).

0216-81-U: Canadian Brotherhood of Railway Transport and General Workers. (Complainant) v. All Star Tours Ltd., (Respondent). (*Granted*).

0365-81-U: Donald Lawrence, (Complainant) v. Sonic Transport Systems Limited, (Respondent). (*Granted*).

0617-81-U; 0618-81-U; 0619-81-U; 0620-81-U; 0621-81-U; 0622-81-U; 0623-81-U: Retail, Commercial & Industrial Union, Local 206, Chartered by United Food & Commercial Workers International Union, (Complainant) v. Comstock Funeral Home Ltd. (Respondent). (*Withdrawn*).

0721-81-U: United Electrical, Radio and Machine Workers of America, Local 567, (Complainant) v. Milltronics Limited, (Respondent). (*Withdrawn*).

1071-81-U: The Amalgamated Clothing and Textile Workers' Union, (Complainant) v. Trimarine (Canada) Ltd., (Respondent). (*Dismissed*).

1211-81-U: Retail, Commercial & Industrial Union, Local 206, Chartered by United Food & Commercial Workers International Union, (Complainant) v. Comstock Funeral Home Ltd.) (*Withdrawn*).

1373-81-U: Radenko Bukvich, Victor Clarke, Michele D'Alonzo, Miodrag Psodorov, and Peter Lazaridis, (Complainants) v. Local Union 304 Canadian Union of United Brewery, Flour, Cereal, Soft Drink and distillery Workers, (Respondent) v. Dufferin Aggregates, A Division of Dufferin Materials and Construction Ltd., (Intervener). (*Dismissed*).

1490-81-U: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Complainant) v. Charterways Transportation Ltd., (Respondent). (*Granted*).

1521-81-U: Gail Catherine Wegman, (Complainant) v. Filtran Limited, (Respondent). (*Withdrawn*).

1576-81-U: Laundry and Linen Drivers and Industrial Workers Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Allglass Inc., (Respondent). (*Withdrawn*).

1584-81-U: Service Employees' International Union, Local 204, (Complainant) v. K-Mart Canada Limited, (Respondent). (*Granted*).

1621-81-U: Gurnam Dhanota, (Complainant) v. International Union United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.) Local Union No. 1285, (Respondent) v. Sheller-Globe of Canada, Ltd., (Intervener). (*Dismissed*).

1685-81-U: Comstock Funeral Home Ltd., (Complainant) v. Retail, Commercial & Industrial Union, Local 206, Chartered by United Food & Commercial Workers International Union, (Respondent). (*Dismissed*).

1727-81-U: United Brotherhood of Carpenters and Joiners of America, Local 785, (Complainant) v. Watcon Inc., (Respondent). (*Withdrawn*).

1838-81-U: Laundry and Linen Drivers and Industrial Workers Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Allgalss Inc., (Respondent). (*Withdrawn*).

1937-81-U: Shervill-Dickson Limited, (Complainant) v. Toronto Typographical Union No. 91 (ITU), The Toronto Allied Printing Trades Council and James Buller, (Respondents). (*Withdrawn*).

1978-81-U: London & District Service Workers' Union, Local 220 A.F.L. C.I.O. C.L.C., (Complainant) v. Coronet Motor Hotel, (Respondent) (*Withdrawn*).

1979-81-U: London & District Service Workers' Union, Local 220, A.F.L. C.I.O. C.L.C., (Complainant) v. St. Raphael's Nursing Homes Ltd., (Respondent). (*Withdrawn*).

1980-81-U: London & District Service Workers' Union Local 220, A.F.L. C.I.O. C.L.C., (Complainant) v. Chateau Gardens (Hanover) Inc., (Respondent). (*Withdrawn*).

1986-81-U: Ronald Pickering, (Complainant) v. Amalgamated Transit Union, Local 113 and Toronto Transit Commission, (Respondent). (*Withdrawn*).

1987-81-U: United Steelworkers of America, (Complainant) v. Novi Canadian Ltd., (Respondent). (*Withdrawn*).

1996-81-U: Office & Professional Employees International Union, (Complainant) v. West Fort William Credit Union Limited, (Respondent). (*Withdrawn*).

2004-81-U: Brian Morgan and certain casual employees, (Compalainant) v. Metropolitan Toronto Civic Employees Union, Local 43 (CUPE), (Respondent) v. Corporation of the City of Toronto, (Intervener). (*Dismissed*).

2019-81-U: Peter Knapp, (Complainant) v. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. and its Local 195, (Respondent) v. Nickleson Tool and Die Company Limited, (Intervener). (*Dismissed*).

2032-81-U: Edward David Smith, (Complainant) v. Robertson Building Systems and United Steel Workers Union Local 4166, (Respondent). (*Withdrawn*).

2047-81-U: The Wallace Barnes Company, Limited (Associated Spring Operations, Barnes Group), (Complainant) v. United Steelworkers of America, Local 8761, (Respondent). (*Withdrawn*).

2054-81-U: Lee Ann Taylor, (Complainant) v. Windsor Airline Limousine Service Limited carrying on business as Veteran Cab Co., (Respondent). (*Withdrawn*).

2059-81-U: United Food and Commercial Workers International Union, Local 725, AFL-CIO-CLC, (Complainant) v. Mr. Greenjeans Restaurant, (Respondent). (*Withdrawn*).

2061-81-U: Canadian Union of Public Employees, (Complainant) v. Country Place Residence, (Respondent). (*Withdrawn*).

2064-81-U: Christian Labour Association of Canada, (Complainant) v. Sun Ray Solar Systems Limited, (Respondent). (*Withdrawn*).

2070-81-U: Tom Foley, (Complainant) v. United Steelworkers of America Local 5009, (Respondent). (*Withdrawn*).

2097-81-U: M. A. Fazil, (Complainant) v. U.A.W. Local 27, Unit 13, and Bendix H.V.S.G. Inc., London, Ontario (Respondents). (*Withdrawn*).

2107-81-U: United Electrical, Radio and Machine Workers of AMerica (UE), (Complainant) v. Accuflex Industrial Hose Ltd., (Respondent). (*Withdrawn*).

2108-81-U: John C. Gilpin, (Complainant) v. Officers & Officials of USWA Local 9038 and Electrosonic Inc., (Respondents). (*Withdrawn*).

2109-81-U: John C. Gilpin, (Complainant) v. Officers & Officials of USWA Local 9038 and Electrosonic Inc., (Respondents). (*Withdrawn*).

2195-81-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Complainant) v. Shoppers Drug Mart/Edlee Drugs Ltd., (Respondent). (*Withdrawn*).

2213-81-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Complainant) v. Data Ribbon Limited, (Respondent). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO PROSECUTE

1995-81-U: Office & Professional Employees International Union, (Applicant) v. West Fort William Credit Union Limited, (Respondent). (*Withdrawn*).

APPLICATIONS FOR RELIGIOUS EXEMPTION

1079-81-M: William A. Jordan, (Applicant) v. The York University Faculty Association, (Respondent Trade Union) v. The Board of Governors of York University, (Respondent Employer). (*Dismissed*).

1080-81-M: Alfred B. P. Lever, (Applicant) v. The York University Faculty Association, (Respondent Trade Union) v. The Board of Governors of York University, (Respondent Employer). (*Dismissed*).

1224-81-M: Helen Sarah Freedhorf, (Applicant) v. The York University Faculty Association, (Respondent Trade Union) v. The Board of Governors of York University, (Respondent Employer). (*Dismissed*).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

1934-81-M: The Canadian Linen Supply (Ontario) Limited, of the City of Ottawa, in the County of Carleton, (Employer) v. Laundry, Dry Cleaning and Dye House Workers' International Union, Local 351, (Union). (*Granted*).

1940-81-M: Silcofab Limited, (Employer) v. Amalgamated Clothing and Textile Workers Union AFL-CIO-CLC, (Union). (*Granted*).

2027-81-M: Foodcorp Limited carrying on business as Swiss Chalet Bar B.Q., (Employer) v. Canadian Union of Restaurant and Related Employees, (Union). (*Granted*).

2037-81-M: Campbell Steel & Iron Works Ltd., (Employer) v. The United Steelworkers of America, Local 14856, (Union). (*Granted*).

2053-81-M: Glove Reconditioners, A Division of Total Services Inc., (Employer) v. Laundry, Dry Cleaning and Dye House Workers International Union, Local 351, (Union). (*Granted*).

JURISDICTIONAL DISPUTES

2084-81-JD: Labourers' International Union of North America, Local 491, (Complainant) v. F.D.V. Construction Limited, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 800, and Michael Zangari, (Respondents). (*Granted*).

2184-81-JD: Operative Plasterers and Cement Masons' International Association of the United States and Canada, Local 124, (Complainant). v. The International Union of Bricklayers and Allied Craftsmen, Local 10, Michael Quesnel and Ottawa G.S.B. Construction Co. Ltd., (Respondents). (*Granted*).

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

0286-81-M: United Steelworkers of America, (Applicant) v. Regal Spring Company, (Respondent). (*Withdrawn*).

0287-81-M: United Steelworkers of America, (Applicant) v. Globe Spring and Cushion Company Limited, (Respondent). (*Withdrawn*).

0288-81-M: United Steelworkers of America, (Applicant) v. Acme Spring Products Limited, (Respondent). (*Withdrawn*).

0289-81-M: United Steelworkers of America, (Applicant) v. Kelson Spring Products Limited, (Respondent). (*Terminated*).

1808-81-M: Service Employees Union, Local 268, (Applicant) v. Lake Superior Board of Education, (Respondent). (*Dismissed*).

1834-81-M: The Kapuskasing & District Association for the Mentally Retarded, (Applicant) v. Office and Professional Employees International Union, Local 166, (Respondent). (*Withdrawn*).

1835-81-M: Canadian Union of Public Employees, Local 167, v. The Corporation of the Town of Dundas, (Respondent). (*Withdrawn*).

1935-81-M: Local Board of Health of the Borough of York, (Applicant) v. The Ontario Nurses' Association, Local 59, (Respondent). (*withdrawn*).

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1263-81-OH: Brenda E. Beattie, (Complainant) v. Auto Jobbers Warehouse Ltd., (Respondent). (*Granted*).

2056-81-OH: Carol Sadecky, (Complainant) v. United Publications, (Respondent). (*Withdrawn*).

2057-81-OH: Barb Haselgrove, (Complainant) v. United Publications, (Respondent). (*Withdrawn*).

2058-81-OH: Mary Annes, (Complainant) v. United Publications, (Respondent). (*Withdrawn*)

COLLEGES COLLECTIVE BARGAINING ACT

Applications for Determination of Employee Status

1839-81-M: Ontario Public Service Employees Union, (Applicant) v. Seneca College of Applied Arts and Technology, (Respondent). (*Withdrawn*).

CONSTRUCTION INDUSTRY GRIEVANCES

0043-81-M: United Brotherhood of Carpenters and Joiners of America, Local 2468, (Applicant) v. Roy Construction & Supply Company Limited, (*Withdrawn*).

0987-81-M: Labourers' International Union of North America, Local 183, (Applicant) v. Butera Const. Ltd., (Respondent). (*Dismissed*).

1188-81-M: Labourers' International Union of North America, Local 1059, (Applicant) v. Reinhardt Masonry Limited, (Respondent). (*Withdrawn*).

1376-81-M; 1377-81-M: International Brotherhood of Painters and Allied Trades, Local 114, (Applicant) v. Belleville Plate & Window Glass, the registered business style and name of Kingston Plate & Window Glass (#3) Ltd. and/or PPG Industries Canada Ltd., (Respondent). (*Granted*).

1530-81-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 3227 and 3233, United Brotherhood of Carpenters' and Joiners of America, (Applicant) v. B. & H. Woodworkers, (Respondent). (*Withdrawn*).

1549-91-M: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and International Union of Bricklayers and Allied Craftsmen, Local 5, (Applicants) v. London Caulking and Installations Limited and Pro-Tech Weatherproofing Inc., (Respondents). (*Granted*).

1817-81-M: International Brotherhood of Painters and Allied Trades Local 1824, (Applicant) v. Universal Painting, (Respondent). (*Withdrawn*).

1897-81-M: The Carpenters' Section of the Carpenters' District Council of Toronto and Vicinity, United Brotherhood of Carpenters and Joiners of America, on behalf of Local Union 1190, (Applicant) v. Union Carpentry Contractors Ltd., (Respondent). (*Granted*).

1901-81-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 3227, and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Eastern Canada Contractors Ltd., (Respondent). (*Granted*).

1968-81-M: Chatham Construction Workers Association, Local #53 affiliated with the Christian Labour Association of Canada, (Applicant) v. Eastside Electric Limited, (Respondent). (*Withdrawn*).

1989-81-M: United Brotherhood of Carpenters and Joiners of America, Local Union 93, (Applicant) v. Bellai Brothers Ltd., (Respondent). (*Granted*).

1991-81-M: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Terry Leroux Leroux Contracting and T. E. Leroux Contracting Ltd., (Respondents). (*Granted*).

1997-81-M: International Union of Operating Engineers, Local 793, (Applicant) v. Employer Bargaining Agency and its Affiliate Elmara Construction Co. Ltd., (Respondent). (*Withdrawn*).

2016-81-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 3227, and 3233, United Brotherhood of Carpenters' and Joiners of America, (Applicant) v. Eastern Canada Contractors Ltd., (Respondent). (*Granted*).

2021-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787, (Applicant) v. Honeywell Limited, (Respondent). (*Withdrawn*).

2022-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787, (Applicant) v. Custom Refrigeration Limited, (Respondent). (*Withdrawn*).

2023-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787, (Applicant) v. Prime Energy Systems Limited, (Respondent). (*Withdrawn*).

2033-81-M: United Brotherhood of Carpenters and Joiners of America, Local Union 1946, (Applicant) v. Matassa Contractors Limited, (Respondent). (*Withdrawn*).

2035-81-M: Carpenters District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 3227 and 3233, United Brotherhood of Carpenters' and Joiners of America, (Applicant) v. Clifford Masonry Limited, (Respondent). (*Withdrawn*).

2046-81-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Begg & Daigle, (Respondent). (*Withdrawn*).

2048-81-M: Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Ekko Drywall Limited, (Respondent). (*Withdrawn*).

2067-81-M: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Michele Mastrangelo Construction Company Limited, (Respondent). (*Granted*).

2072-81-M: Local 787, Refrigeration Installation and Service Mechanics and Apprentices of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Applicant) v. Perrin-Turner Limited, (Respondent). (*Granted*).

2075-81-M: Unitd Brotherhood of Carpenters and Joiners of America, Local 18, (Applicant) v. Donaldson & Barron Ltd., (Respondent). (*Dismissed*).

2078-81-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. C. & D Plastering Limited, (Respondent). (*Granted*).

2092-81-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. C & D Plastering Limited, (Respondent). (*Granted*).

2094-81-M: International Brotherhood of Painters and Allied Trades Local 1783, (Applicant) v. Paramount Painting & Decorating Ltd., (Resondent). (*Withdrawn*).

2103-81-M: Millwright Local 2309 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Schomberg Millwright Services Ltd., (Respondent). (*Withdrawn*).

2111-81-M: Ontario Provincial Conference of the International Union of Bricklayers and Allies Craftsmen, (Applicant) v. Gargaro Tile, (Respondent). (*Withdrawn*).

2112-81-M: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. I.D. Construction, (Respondent). (*Withdrawn*).

2113-81-M: Ontario Provincial Conference of the International Union of Bricklayes and Allied Craftsmen, (Applicant) v. David H. Little Limited, (Respondent). (*Withdrawn*).

2115-81-M: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Nadalin Contractor Floor & Wall Coverings Limited, (Respondent). (*Granted*).

2116-81-M: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Ottawa-Carleton Brick Laying and Masonry Limited, (Respondent). (*Withdrawn*).

2117-81-M: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Star Tile Centre Limited, (Respondent). (*Withdrawn*).

2120-81-M: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. Rochefort Construction Ltd., (Respondent). (*Withdrawn*).

2128-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting of the United States and Canada, Local 787, (Applicant) v. Goodwin Refrigeration Limited, (Respondent). (*Withdrawn*).

2129-81-M: International Brotherhood of Painters and Allied Trades District Council 46 — Toronto, (Applicant) v. J. Lama Contracting, (Respondent). (*Granted*).

2139-81-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Ridgewood Insulations Limited, (Respondent). (*Withdrawn*).

2149-81-M: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Metro Century Construction Ltd., (Respondent). (*Withdrawn*).

2187-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787, (Applicant) v. Able Boiler Repair Inc., (Respondent). (*Withdrawn*).

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

0441-81-R: Operative Plasterers' and Cement Masons' International Association, Local 172, (Applicant) v. Clifford Masonry Limited, (Respondent) v. Labourers' International Union of North America, Local 506, (Intervener). (*Dismissed*).

0470-81-OH: Ted Nickarz, (Complainant) v. Union Miniere Explorations and Mining Corporation, (Respondent). (*Dismissed*).

0580-81-R: The Labourers' International Union of North America, Local 506, (Applicant) v. Clifford Masonry and Building Restoration Ltd., (Respondent). (*Dismissed*).

0643-81-R: United Electrical, Radio and Machine Workers of America (UE), (Applicant) v. SGS Supervision Services Inc. Qualitest Technical, (Respondent). (*Dismissed*).

0960-81-M: Local Union 1669 United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Leroux Construction, Leroux Construction Ltd., and T.E. Leroux Contracting Ltd., (Respondents). (*Dismissed*).

1597-81-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Standard Group Ltd., (Respondent). (*Dismissed*).

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Certification – Discharge for Union Activity – Unfair Labour Practice – Employees laid off day after certification application filed – whether layoff caused by economic downturn – Whether timing and selection of employees for layoff motivated by anti-union considerations

BEFORE: R.O. MacDowell, Vice-Chairman, and Board Members F. W. Murray and O. Hodges.

APPEARANCES: *B. Shell for the applicant/complainant; R.J. McComb, L. Marzari, J. Dorsay for the respondent; Joe Placido for the objectors.*

DECISION OF THE BOARD: March 4, 1982

1. The Board directs that the above application and complaint be and the same are hereby consolidated.

2. This is an application for certification which was heard together with a complaint under section 89 of the *Labour Relations Act*. Originally, the union contended that the Board should issue a certificate pursuant to section 8 of the Act. After the initial days of hearing, the union withdrew this request. However, because the conduct of a representation vote might be affected by the outcome of the section 89 complaint, the parties were content that the related application/complaint should continue to be heard together and disposed of by a single decision.

3. Almost all of the membership cards in the trade union were signed on October 28, 1981. There is no other evidence concerning the union's organizing campaign. The application for certification itself was filed on October 29, 1981. On October 30, a number of the respondent's employees were indefinitely laid off.

4. The union concedes that the October 30th lay-off occurred before the respondent would have had formal notice of the application for certification, and further, that a lay-off would have occurred sometime in the fall in any event. It is admitted that the respondent's business is highly seasonal and that production cutbacks and consequent lay-offs usually occur around this time. The union contends however, that the timing of this particular lay-off, and the selection of the individuals terminated were both influenced by anti-union considerations.

5. On a complaint of this nature, section 89(5) casts an onus upon the respondent to demonstrate that its conduct was motivated solely by bona fide business considerations, and was not influenced in whole or in part by anti-union animus. That is the respondent's position in the instant case.

6. The Board heard considerable evidence concerning the deteriorating business conditions which allegedly precipitated the October 30th lay-off. Lou Marzari, the owner of the respondent, and Jack Dorsay, the general manager of the Extrusion Division, both gave evidence, and their testimony was supplemented by extensive extracts from the respondent's

sales and production records. The Board found both Marzari and Dorsay to be open, candid and entirely credible witnesses; moreover, when the statistical material is considered, it graphically demonstrates the difficult market situation faced by the respondent in the weeks immediately preceding the lay-off. We do not consider it necessary to set out this evidence in its entirety, nor is it necessary to review all of the oral testimony. It will be sufficient if we outline the respondent's general business situation and the factors which prompted it to act as it did.

7. Aluminart Products Limited is Canada's largest manufacturer of aluminum storm doors and windows. It was established in 1972 and now employs approximately 100 employees at its assembly plant in Mississauga. In November 1980, Aluminart established an extrusion division in Georgetown. The employees of the extrusion division were the object of the union organizing campaign which eventually culminated in the present certification application.

8. Prior to the establishment of its own Extrusion Division, Aluminart purchased extruded metal products — the components for its own manufacturing and assembly operation — from such large aluminum producers as Kaiser, Reynolds, and Alcan. This source of supply was unstable, not only because of fluctuations in the marketplace, but also because these companies were also Aluminart's competitors. When market demand was strong, it could be expected that they would supply their own needs first. Accordingly, Marzari decided that it would be advantageous to have a guaranteed source of supply from his own extrusion plant — provided that neither Aluminart itself nor its Extrusion Division would be wholly dependent upon one another. Each was to be an independent, self-sustaining operation.

9. It was expected that Aluminart would absorb about 1/3 of the Extrusion Division's total output. The rest was to be sold to third parties with a complementary production cycle. These third parties were to provide a cushion to even out the "boom or bust" features of the market.

10. The capital investment for the Extrusion Division was substantial, but it was anticipated that the plant would become an economic proposition when it reached a level of activity requiring two full shifts. That level of activity was never reached, nor was outside demand ever strong enough to support it. The third party customers did not materialize as quickly as expected, and, in consequence, the Mississauga assembly plant continued to absorb some 2/3 of the Extrusion Division's total production. This close economic relationship weakened the Extrusion Division's position, for without a body of outside customers to cushion the blow, any softening in Aluminart's own market would be immediately transmitted to its Extrusion Division. This is what happened in October 1981.

11. Demand for storm doors and windows follows a characteristic pattern building up through the summer months, and (depending upon economic conditions and the weather) peaking in September or October. From that peak, there is always a precipitous decline in orders, so that within a few weeks of the peak, the Mississauga plant is forced to lay off more than a third of its employees. The employees are recalled again in the spring. The pattern is the same for Aluminart's competitors.

12. In early 1981, market demand was exceptionally strong, with monthly orders

exceeding the levels reached in previous years. The economic picture looked favorable for both Aluminart and its Extrusion Division. But orders peaked in August — six to eight weeks before it was expected that they would, and the peak was below the level achieved in 1979 and 1980. Marzari was deeply concerned for if the earlier trend had been maintained, the peak should have been much higher and should have occurred much later. Moreover, if the decline followed the past pattern, orders would now begin to plunge. It would be necessary to cut back production early and scramble to balance his inventory. Marzari speculated about whether the drop in orders was a temporary aberration and concluded, — correctly as it turned out, — that it was not. The weakening economy, high interest rates, and a slowdown in residential construction, all contributed to an early decline in the market for Aluminart's products. Marzari decided that he would have to significantly cut back his own production, and this, in turn, would require a production cutback and lay-off in the Extrusion Division.

13. Aluminart sought first to cancel orders of extruded material which it had placed outside its own organization. On September 11, 1981, it cancelled a 7,000 pound order from Kaiser. On September 29, 1981, it cancelled delivery of 46,000 pounds of material from Alcan, and negotiated a delay in the delivery of an additional 10,700 pounds (representing material Alcan had already produced) until November 10. On October 9, it cancelled orders from Reynolds involving in excess of 16,000 pounds, and delayed delivery of a further 34,000 pounds until November. Thus, before turning to its own Extrusion Division in Georgetown, it either cancelled or delayed deliveries from other suppliers in respect of about 114,000 pounds of material.

14. The cancellation of deliveries from its own Georgetown plant were taken in consultation with Jack Dorsay, the plant manager. Those discussions occurred periodically throughout September and early October. On October 16, Marzari cancelled orders from the Extrusion Division involving 100,000 pounds of material. On October 19, an additional 30,000 pounds were cancelled. Finally, on October 29, following an inventory of Aluminart's existing stock and an assessment of its immediate needs, Dorsay was advised of the cancellation of an additional 63,000 pounds.

15. Before the bottom dropped out of the market in October 1981, the Extrusion Division had appeared to be progressing successfully. It started slowly after its inception in November 1980, and had initial difficulties hiring the required skilled employees from the local labour market. But these were gradually assembled, and by the summer of 1981, Dorsay was optimistic that the Extrusion Division could become a viable entity. By late summer, orders and manpower were sufficient to sustain an extra half shift — less than the two full shifts necessary for a profitable operation — but still an improvement over previous months. The early peak in the storm window business was an ominous cloud on the horizon but Dorsay was hopeful that the production fall off would not be as serious as anticipated, and that the development of third party sales would provide the needed cushion. Dorsay's optimism faded early in October when it became apparent that the burden of Aluminart's problems would inevitably have to be shared with its own Extrusion Division.

16. In September, running with one and a half shifts, the Extrusion Division's production exceeded 200,000 pounds. It had orders for just under 200,000 pounds. In October, its production level was approximately the same, but orders had dropped to well below that. The cancellation of 130,000 pounds destined for the Mississauga plant convinced Dorsay that a severe production cutback and a lay-off were both inevitable, but he had to

await the annual inventory at the Mississauga plant before he could determine the extent of further cancellations, and consequently, the extent of the lay-off in the Extrusion Division. In the meantime, on October 23, he cut back from one and a half to one shift, thereby cutting output by about 1/3. This was accomplished primarily through attrition, although the evidence also indicates that many of the employees left were not fully occupied in the days between October 23 and October 30.

17. The week of October 26 was a critical one. As we have already noted, on October 29, Dorsay learned of the cancellation of orders for an additional 63,000 pounds of material destined for the Mississauga plant. In addition, between October 23 and October 29, outside customers cancelled orders for a further 75,000 pounds of material. Since the production of one shift amounts to about 50,000 pounds per week, in the weeks immediately preceding the lay-off, Dorsay had been informed of the loss of 5 weeks work. Dorsay testified that orders to be filled in the week following the October 30th lay-off amounted to about 35,000 pounds — or less than the production capacity of one complete shift. It was obvious to Dorsay, and it is obvious to this Board that a lay-off was called for, and its timing had nothing to do with the trade union. Indeed, it may well be that the reverse is true and that the employees, anticipating a further cutback, turned to the union in the hope of protecting their job security.

18. We turn to the question of the selection of the employees to be laid off.

19. Of the eighteen employees on the rolls of the Extrusion Division as of October 30, 1981, seven were laid off. Of these, only two had been employed long enough to acquire seniority under the employer's established personnel policy. All but one of the employees laid off were labourers, and one, the most senior, has since been recalled. For the most part, the employees laid off were the ones hired in July and August to put together the extra half shift. The only non labourer was Curtival Lecky, a press operator whose job became redundant when Dorsay reduced the number of hours that the equipment was operating. After October 30, the press was running at a level which could easily be handled by the other (more senior) operator.

20. Aluminart has an established policy with respect to lay-offs. The selection is based upon the employees' relative seniority and ability. On October 30, there were three exceptions to the seniority principle and we are satisfied with the respondent's explanation with respect to each of them. The respondent asserts, and we accept, that each of the junior employees retained, had capabilities beyond those of the employees who were laid off, which outweighed their lower seniority (which in any event differed from that of those laid off by only a few weeks). The Board notes that, with the exception of Lecky whose situation we have already mentioned, each of the junior employees kept on was already being paid at a higher rate than the employees laid off. This wage premium was established well before there was any thought of a lay-off or the union, and tends to support the respondent's claim, that these employees had skills or abilities beyond those of the individual laid off.

21. Curtival Lecky testified that on the morning of October 29, the day before the lay-off, he was approached by Murko Gavez, the plant foreman, and the two had a brief discussion about the union. Gavez is alleged to have pointed out two other employees — Nick Stipelski and Stewart Leslie — and remarked that they were the bastards organizing the union. Gavez is alleged to have said to Lecky (who was a lead hand, considered himself part of management, and was not a union supporter) that all the company had to do was lay off the

offending employees, close down for a couple of weeks and open up again with a new name and new employees. If that happened, Lecky could be laid off too. Gavez denied this conversation as did Ev Pacheco who is alleged to have been present.

22. Having regard to the manner in which the various witnesses gave their evidence and their performance under cross-examination, we prefer Lecky's evidence wherever it conflicts with that of Gavez or Pacheco. This does not mean that Lecky was laid off for trade union activity however. It is rather unlikely that Gavez would have made these remarks to Lecky if he were thought to be a union supporter – as, of course, he was not. We do not accept that Lecky's lay-off had anything to do with the union and it is interesting to note that the two individuals singled out by Gavez as union's supporters were *not* laid off. Thus, while we accept that Gavez became aware of the employees' union activities on October 29, and was disturbed by it, we are not satisfied that anti-union motivation entered into the selection of the individuals to be laid off. Dorsay testified that seniority, ability and flexibility were the criteria applied, and we accept his evidence in this regard.

23. For the foregoing reasons, the Board finds that neither the timing of the lay-off nor the selection of the individuals to be laid off was motivated by anti-union consideration. The complaint under section 89 is therefore dismissed.

24. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

25. The Board further finds that all employees of the respondent company in the Town of Halton Hills, save and except foreman, persons above the rank of foreman, office and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

26. On the basis of all of the evidence before it, the Board further finds that not less than forty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on November 10, 1981, the terminal date fixed for this application and the date which the Board determines pursuant to section 103(2)(j) of the Act, to be the date for ascertaining membership under section 7(1) of the said Act.

27. A representation vote will be taken among the employees of the respondent. The employees will be asked to indicate whether or not they wish to be represented by the applicant union in their employment relations with the respondent. Those entitled to vote will be all employees of the respondent in the bargaining unit on the date hereof who do not terminate their employment or are not discharged for cause between the date hereof and the date on which the vote is taken.

28. The matter is referred to the Registrar.

1666-81-U International Woodworkers of America, Local 2-600,
Complainant, v. **Amoco Fabrics Ltd.**, Respondent.

Duty to Bargain in Good Faith – Evidence – Interference in Trade Unions – Unfair Labour Practice -- Decision to remove work to another plant made while negotiations ongoing – Employer believing no adverse effects on employees – Whether duty to disclose – Whether move and resulting lay-offs motivated by anti-union sentiments – Extent of duty of disclosure at bargaining table discussed – Whether respondent having obligation to adduce all documents relevant to complaint

BEFORE: M. G. Picher, Vice-Chairman, and Board Members S. Cooke and J. A. Ronson.

APPEARANCES: *J. Sack for the complainant; F. R. von Veh and Steve McCormack for the respondent.*

DECISION OF THE BOARD; March 26, 1982

1. This is a complaint under section 89 of the *Labour Relations Act*. The complainant alleges that the respondent has bargained in bad faith and committed other unfair labour practices in respect of the layoff of a large number of its employees and the transfer of certain parts of its production from its plant at Hawkesbury to its plant at Cornwall. The union submits that the employer has violated sections 3, 15, 60, 64, 66, 70, 72, 75 and 76 of the Act.

2. Initially the complainant requested broad relief, including a cease and desist order, an order directing the respondent to bargain in good faith and an order directing the respondent to reinstate the grievors, with compensation, to their jobs or to substantially equivalent jobs at the Cornwall plant, including all costs of moving and relocation. The employees in the company's Cornwall plant are represented by a separate union. At the initial hearing that union, the Amalgamated Clothing and Textile Workers Union, (A.C.T.W.U.), and two of its locals sought to intervene in these proceedings to protect their interest as bargaining agents in the respondent's plants at Cornwall and Brantford.

3. A preliminary issue respecting the standing of the A.C.T.W.U. and its locals was disposed of at the outset of the hearing. To the extent that the initial relief requested would have involved the displacement of employees at Cornwall represented by the A.C.T.W.U. that union would have had standing in these proceedings. The seniority provisions in its collective agreement with the company would have been abrogated by an order of this Board ordering the reinstatement of Hawkesbury employees into the Cornwall plant with full seniority for service accrued in Hawkesbury. To that extent the A.C.T.W.U. had a legal interest in the outcome of this complaint. In face of the preliminary motion counsel for the complainant union amended the prayer for relief. Apart from the declaratory and cease and desist orders he limited the reinstatement remedy sought to an order allowing Hawkesbury employees ninety days to accept a first opportunity to hire into new vacancies at the Cornwall plant. That amendment removed the possibility of any adverse impact on the contract rights or representation rights of the A.C.T.W.U. at Cornwall. The Board therefore ruled that that union and its two locals were without standing to participate in the hearing of this complaint.

4. A number of facts are not in dispute. The respondent is a subsidiary of Standard Oil of Indiana. It manufactures artificial fibres from petrochemical products. Since June of 1972, after certification by this Board, the complainant has had a series of collective agreements at

the plant of the respondent and its predecessor, Patchoque Plymouth, at Hawkesbury. Negotiations for the most recent collective agreement were long and difficult, involving a protracted strike. It is those negotiations that give rise to this complaint. Following the expiry of the collective agreement ending December 30, 1979 negotiations between the parties took place from November 1979 through September 1980. A lawful strike took place from May 12, 1980 to September 22, 1980. Neither party disputes that it was a heated and widely publicized strike marked by picket line violence, injunctions and criminal prosecutions. Between April of 1980 and the reaching of a settlement in September the parties had the assistance first of a conciliator, then of a mediator and lastly of a two-man advisory committee appointed by the Minister. In the fall of 1980 the strike ended, a collective agreement was signed and production resumed.

5. changes occurred after the strike. At the outset of the strike the bargaining unit numbered approximately 540 employees. When the employees returned to work certain changes had been implemented and others were in the course of being effected. A computerized extruder which was installed prior to the strike had been dismantled and moved to the company's Cornwall plant. A few months after the strike, in December of 1980 and January of 1981, more machinery and equipment began to move out of the Hawkesbury plant: 47 looms were moved to Cornwall in January and February, 10 looms were moved to another plant at Brantford in April, and 20 looms were moved to plants in the United States. A further 10 looms were moved to Cornwall in June.

6. During and following this period layoffs took place. Forty-one employees were laid off at the Hawkesbury facility effective January 4, 1981, 27 of whom were later recalled. On February 12, 1981 a further 9 employees were laid off at the Hawkesbury facility. A policy grievance filed in relation to that layoff was dismissed at arbitration. The 9 employees laid off were later recalled.

7. The most contentious layoff, the incident giving rise to this complaint, came on November 10, 1981 when 131 employees at the Hawkesbury plant were laid off indefinitely. Twelve individual grievances and one policy grievance have been filed in respect of the layoff and are proceeding to arbitration. On that basis counsel for the respondent urged this Board to decline to hear this complaint and defer to the arbitration process. The Board reserved on that motion at the hearing, preferring to hear the evidence before ruling. Having regard to the nature of the complaint and the remedies being sought, some of which transcend the limits of the collective agreement, we do not consider this to be a case in which the Board should defer to boards of arbitration (See *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254).

8. The union complains that the company with anti-union motive, has deliberately and systematically reduced the bargaining unit from 540 employees to approximately 260 employees as a reprisal for the union's militancy and as a means of discouraging the exercise of collective bargaining rights by the employees at Hawkesbury. The union further maintains that the company violated its duty to bargain in good faith. On the theory of *Westinghouse Canada Limited*, [1980] OLRB Rep. Apr. 577, it submits that the respondent failed in its duty to discuss with the union relocation plans that were to have an impact on the union and its members. The two branches of the complaint give rise to two separate burdens of proof. The burden is upon the complainant union to establish that the company has failed to bargain in good faith and make every reasonable attempt to make a collective agreement; the burden is upon the company to establish that the layoffs and the transfer of work from Hawkesbury was not the result of an anti-union motive or an intention to chill lawful union activity.

9. The evidence of the company was given by Mr. Ken Thompson, President of Amoco Fabrics Ltd. In 1979, 1980 and until September of 1981 Mr. Thompson was the Vice-President of the respondent in charge of marketing. Mr. Thompson's evidence is that moving part of the company's operations from Hawkesbury to Cornwall is part of an overall strategy to rationalize production in three Ontario plants. According to his evidence the plan was under consideration for a considerable period of time and its implementation began before the events giving rise to this complaint. He testified that the decision to implement the plan is entirely unrelated to the labour difficulties or union activity at Hawkesbury.

10. Mr. Thompson's evidence included a lengthy account of the structure and operations of Amoco Fabrics Ltd. It is not necessary to dwell on the detail of his testimony, which can be readily summarized for the purposes of this complaint. The company has three principal products: carpet backing, industrial fabrics — including produce bags, bulk packaging and industrial applications of synthetic textiles and lastly, fibre and yarns which are used in woven textile goods.

11. The carpet backing manufactured by the company is of two kinds; primary carpet backing (the mat into which the carpet yarn is tufted) and secondary carpet backing (the heavy synthetic jute which is laminated onto the first layer of backing and forms the underside of carpeting). In the past fifteen years synthetic fibres have succeeded in displacing natural jute, generally imported from India and Bangladesh, as the primary material in secondary carpet backing. According to Mr. Thompson however, upward pressure in the world prices of oil and the relationship of North American currencies to the pound sterling, the trading currency for jute, have had an adverse impact on the competitive position of synthetic fibres. As a result jute is now available at 1967 prices and the carpet manufacturers who are a significant portion of the market previously serviced by Amoco Fabrics Ltd. are increasingly turning to jute as an alternative. The respondent's industrial fabrics production appears not to have been immediately affected by these developments. In addition to its commercial bagging products for feed, seed, fertilizers and produce it has developed new markets in furniture, bedding, swimming pool liners, asbestos containers, intermediate bulk containers and the production of reinforcing fabrics for engineering applications such as roads and railbeds. The competitive price of jute has also not affected the yarn and fibre production of the respondent.

12. In 1979 the respondent had only one production plant in Canada, located at Hawkesbury. It was devoted to the manufacture of the entire range of products described above. That became a cause of concern for the company from the standpoint of efficiency. Changes in production runs from one product to another could cause considerable down time in the plant, ranging from eight hours for an extruder being transferred from one yarn to another to twenty hours, sometimes thirty-two, for looms. In contrast to Hawkesbury, the company's U.S. plants tended to have the three different product lines concentrated in different plants. In the late 70's the company, largely through studies and suggestions from Mr. Thompson himself, formed the opinion that producing the entire range of its products under one roof at Hawkesbury had substantial inefficiencies and costs that could be avoided. It was felt that a plant that was devoted to fewer product lines with longer runs and fewer changeovers and shutdowns would be less costly in terms of lost time and maintenance and would, in the long run, be more profitable. The company had concerns that the inefficiency of the Hawkesbury plant, producing the widest range of product of any Amoco plant in the world, was actually costing the company in direct sales and its ultimate market share.

13. In the late 1970's Mr. Thompson became aware that the Hawkesbury plant had a

lower return on investment performance than other Amoco plants in the U.S. and abroad. When he looked at the structure of other companies in the fabrics field he found that Amoco's competitors were switching to smaller plants with more specialized product lines. Mr. Thompson felt that that was the way Amoco Fabrics Ltd. should go in Canada if it was to compete successfully.

14. In October of 1978 the company commenced negotiations to purchase a plant owned by Thiokol Fibres in Brantford. With 80 hourly rated employees and 17 salaried staff it was a small plant producing primary carpet backing, a light scrim material used in the lumber industry and a small amount of monofilament yarn. Mr. Thompson, himself a former manager with Thiokol, instigated the purchase of that plant as part of a plan to diversify and rationalize the company's production facilities. He saw the purchase of the Brantford plant, a unionized facility with established bargaining rights held by the A.C.T.W.U., as an opportunity to test first hand the theory that a smaller production unit would be more profitable. The plant was purchased in December of 1979. The performance of the Brantford plant, as reflected in the production books at the time of the takeover, gave him the evidence that he needed; with its production concentrated chiefly on primary carpet backing the Brantford plant yielded product at a lower unit cost than was otherwise possible. Partly on the strength of that evidence Mr. Thompson received approval from the U.S. to implement a plan shifting the company's Canadian production facilities to smaller scale operations. In February of 1980 the company decided to investigate alternative manufacturing sites in Ontario as part of a plan to remove certain product lines from the Hawkesbury plant.

15. It was decided that the company's new plant would be dedicated principally to the manufacture of industrial bagging, the principal market for which is in Montreal, with secondary markets in Toronto. After studying possible locations in Cornwall, Brockville, Belleville, Lindsay, Gault, Cambridge, Perth and Smith Falls, the company decided on Cornwall as the site for its new plant. The search for a new plant site was commenced at a time when the plant in Hawkesbury was in negotiations for a new collective agreement; at that time bargaining had been ongoing for some three and a half months, although the strike which was to commence in May 1980 was still some three months away. The search for a new location, however, went on during the strike and the decision to purchase a plant in Cornwall was made in August of 1980, during the last month of the strike.

16. The Cornwall site was ideal. The respondent was able to take over an existing vacant building of approximately 100,000 square feet, located on a railway siding and equipped with a sub-station for electrical energy. The location was good for servicing the Montreal and Toronto markets. Cornwall was also ideal from a labour standpoint; an established textile manufacturing centre, it provided a substantial labour pool, particularly in light of the layoff at that time of approximately 140 employees by a large carpet manufacturer located in the city.

17. Production started in the Cornwall plant in November of 1980. The evidence establishes that apart from one computerized extruder no equipment was moved from Hawkesbury to Cornwall in 1980. The initial equipment installed in Cornwall came from the respondent's facilities in the United States, the United Kingdom and included some looms imported from Switzerland. While the plant in Cornwall initially employed approximately 44 employees, by the summer of 1981 its complement had risen to over 100. At the time of the hearing it had some 168 employees.

18. According to Mr. Thompson the company's production in Canada was rationalized in the following way with the opening of the Cornwall plant:

A *Brantford*

1. Primary carpet backing (for South-Western Ontario manufacturers)
2. Light scrim (small quantities)
3. Fibrilated yarns (small quantities)

B *Hawkesbury*

1. Primary carpet backing (for Quebec manufacturers)
2. Industrial and civil engineering fabrics
3. Staple fibres and fibrilated yarns

C *Cornwall*

1. Secondary carpet backing (lenowoven)
2. Industrial bagging (lenowoven)
3. Spun yarns and staple fibres (open end spinning)

19. The foregoing breakdown reflects some mix of the three production divisions in each of the plants. According to Mr. Thompson it would not have been practical to have one plant dedicated exclusively to each of the divisions of carpet backing, industrial fabrics and yarns. The impact of the company's move, however, was to significantly narrow the lines of production at Hawkesbury. With the introduction of plants in Brantford and Cornwall the following product lines left Hawkesbury.

1. Industrial bagging products
2. Lenowoven mech bags
3. Lenowoven secondary carpet backing

In addition the company decided to install a new "open end" spinning process for making yarn in Cornwall rather than Hawkesbury, as originally planned.

20. The foregoing production changes brought about a substantial movement of equipment away from Hawkesbury. In the early part of 1981 a total of 67 looms were moved to the two other Canadian plants. Forty-seven narrow looms were moved to Cornwall in January and February of 1981 and 10 looms to Brantford in June and July. In addition some 20 looms were moved from Hawkesbury to the company's plant at Hazleton, Georgia where it stocks excess equipment and modifies it for new applications.

21. The movement of capital, however, was not entirely out of Hawkesbury. The evidence establishes that both immediately before the strike and after the strike substantial capital investment was made in the Hawkesbury plant. Mr. Thompson estimates recent capital expenditures in Hawkesbury at approximately four million dollars. Three million of that was attributable to the completion of a new meltspin operation, the construction of which had commenced prior to the strike. Approximately one million is new capital, invested entirely after the strike, principally in the form of two heavy duty face yarn online reclaim systems and two five roll drawstands for an extrusion line which is scheduled to produce fibrilated fibre for artificial grass carpet. In addition, the company has ordered a new bobbin stripper and has commenced the conversion of a production line described as the F.L.W. line. On the whole the evidence is not consistent with an intention to stagnate or wind down operations at Hawkesbury.

22. The evidence also establishes a clear diversification of functions between Hawkesbury and Cornwall. The Hawkesbury plant now concentrates primarily on the markets for non-woven industrial and civil engineering fabrics, primary carpet backing, staple fibres and fibrilated yarns. According to Mr. Thompson the plant has temporarily maintained 10 looms devoted to the production secondary carpet backing principally to save some twenty-five jobs and minimize the impact of the layoffs. The Cornwall plant, on the other hand, staffed with experienced weavers, is dedicated to the production of material requiring more stringent quality standards including industrial bagging, lenowoven yarns, open end spun yarns and secondary carpet backing. According to Mr. Thompson the division of labour between the plants was designed to promote efficiency and productivity by allowing longer production runs, less changeovers, shorter down time and a greater streamlining in overall administration. His unchallenged evidence is that to date the company's projections in that regard have been confirmed. According to Mr. Thompson records monitoring output per hour disclose that overall efficiency has improved. Mr. Thompson testified that the experience in Canada, beginning with the positive performance of the small Brantford plant, has inspired a move to smaller production facilities in the United States, where four small specialized facilities have been built or purchased, following the pattern in the Canadian operations.

23. Against this background of evidence Mr. Thompson was asked two questions fundamental to this complaint. Why, in March of 1980, when the company was in negotiations at Hawkesbury did it not raise with the union the possibility of opening a plant elsewhere in Ontario which might take over some of the production previously performed in the Hawkesbury plant? Secondly, why were some 147 employees at Hawkesbury laid off?

24. The decision to open another plant in Ontario was made in March of 1980. At that time Mr. Thompson was not directly involved in the negotiations for the renewal of the collective agreement at Hawkesbury. As the chief architect of the corporate plan for production in Canada, however, he was aware of the production activity projected for each of the three locations, including Hawkesbury. According to his testimony the company saw no need to advise the union at Hawkesbury of its plans for the location of a new facility in the province. Mr. Thompson explained that in the spring of 1980 the company was experiencing a strong economy in its industry with no apparent end in sight to the growth of its markets. While it was anticipated that some work would move from Hawkesbury, the company had reason to believe that the shift of production would be more than compensated for by growing sales in its new production lines. Specifically, it anticipated an expansion in its production of intermediate bulk containers at Hawkesbury. It also expected that the completion in its multi-

million dollar meltspin facility for the production of staple fibres, then under construction in Hawkesbury, would minimize any significant impact on the employment levels there. According to Mr. Thompson, given the economic buoyancy which the company was experiencing in the spring of 1980 and the prospects for an expansion of certain of its production lines at Hawkesbury, the company did not anticipate that the opening of a third plant in Ontario would reduce the Hawkesbury work force in any significant way. For that reason it did not consider that its decision to open another plant should be the subject of bargaining with the union at Hawkesbury.

25. If the company did not anticipate any substantial lay off at Hawkesbury why were 131 employees laid off on September 15, 1981? The evidence of Mr. Thompson is that the layoff was not caused by the company's decision to open a plant in Cornwall. He stated that beginning in June or July of 1981 a number of the company's markets experienced a serious downturn, causing an unanticipated build-up of inventory through the summer and fall. One of these was the carpet industry which, at the time of the hearing, had declined to some fifty or sixty per cent of its level of activity of the previous year. Mr. Thompson attributed this decline to the present low level of housing construction. By his account the level of housing starts, which at the relevant time were at their lowest since 1961, has a substantial impact on the sale of carpet.

26. The unchallenged evidence of Mr. Thompson is that the respondent's competitors in Canada have been equally affected by the current economic conditions. A Dominion Textiles Ltd. production facility also located in Hawkesbury has recently been required to lay off over forty per cent of its employees. A plant of the respondents located in Roanoke, Alabama was recently closed indefinitely, causing the layoff of some 700 employees. The respondent has also reduced production schedules at its Brantford and Cornwall plants, although there have been no layoffs in those facilities to date.

27. Mr. Thompson's evidence on the events at Hawkesbury is fairly simple and direct. According to his testimony at the time the decision was made to locate a third plant in Ontario, the company did not anticipate the falling markets which later developed. While the company's officers knew that the reduction in looms at Hawkesbury would have an impact on jobs, they anticipated that the new meltspin operation would create about fifty new jobs. In addition the company anticipated strong markets for its staple fibre production, for its grass carpet line, for its intermediate industrial bulk containers and civil engineering fabrics. All things being equal, in a good economy the company felt that it would be able to retain something close to a full complement in its work force at Hawkesbury. The lay off of 147 employees, in addition to the lay off of certain supervisory and office staff, was eventually necessitated because the company's economic predictions were not borne out.

28. The union called very little evidence to directly contradict the testimony of Mr. Thompson. It did not subpoena any company documents in relation to its complaint nor did it ask the Board to order Mr. Thompson to produce such documents during the course of his testimony. Counsel for the union rested his case largely on the argument that since Mr. Thompson did not adduce company records and documents in evidence to substantiate his oral testimony the respondent has not discharged its burden under section 89(5) of the Act. Specifically, according to the complainant, the company did not satisfactorily explain the motives or reasons for the lay off of the employees in September of 1981. The union asserts that the evidence is not sufficient to discharge the burden of proof on the company to establish that

the lay offs were not unlawfully motivated. Counsel for the union submits that where documents would confirm the position being asserted by a party in litigation, the failure to produce those documents or to call as witnesses persons with the best knowledge of the events can give rise to adverse inferences against the party with the custody of the documents or access to those persons. In this regard he referred to *Murray v. Saskatoon* (1952), 2 D.L.R. 499 (Sask. C.A.), at page 505-06; *N.L.R.B. v. Evans Packing Company*, 463 f. (2d) 193 (1972) (U.S. Court of Appeals); *McGregor Hosiery Mills*, [1976] OLRB Rep. Oct. 583 at para. 31-32; *Levesque et al. v. Comeau et al.* (1970), 16 D.L.R. (3rd) 425 (S.C.C.); Wigmore on Evidence, 1979 Edition Vol. 2 Page 182; Sopinka and Lederman, *The Law of Evidence in Civil Cases*, pages 535-37. Other decision of the Board relied on were *Westinghouse Canada Limited*, [1980] OLRB Rep. Apr. 577; *Inglis Limited*, [1977] OLRB Rep. Mar. 128; *Webster and Horsefall (Canada) Ltd.* [1968] OLRB Rep. Sept. 780; *Humpty Dumpty Foods Ltd.*, [1970] OLRB Rep. July 401; *Accutext Limited*, [1980] OLRB Rep. Feb. 131; *Tillotson — Sekisui Plastics Limited*, [1979] OLRB Rep. Oct. 1027; *Silverwood Dairies*, [1981] OLRB Rep. Mar. 321, *Modern Pattern Works Ltd.*, [1976] OLRB Rep. Mar. 67, *Starplex (Scientific Division of Canadian Medical Laboratories Limited)*, [1981] OLRB REP. MAR. 346; *B & S Furniture Manufacturing Limited*, [1980] OLRB Rep. May 645; *Doral Construction Limited*, [1980] OLRB Rep. May 693.

29. As the Board has noted there are two separate burdens of proof in these proceedings. The burden is upon the union to establish that the respondent has breached the duty which it owed to the union under section 15 of the Act to bargain in good faith by failing to bring its plans for expansion in Cornwall to the bargaining table. The company bears the burden of coming forward with a full and satisfactory explanation establishing the reasons for the layoff of the employees at Hawkesbury.

30. The unchallenged evidence establishes that Mr. Thompson was the chief architect of the respondent's production strategy for Canada from 1979 to the present. He testified for the better part of two days, giving a lengthy and detailed explanation of the origins and implementation of the company's decision to locate in Cornwall. He also explained the market conditions affecting the company's production in the middle and late part of 1981 and into the early part of this year. When he was cross-examined on facts that could be borne out in company documents, he was asked a number of times by counsel for the union whether such documents existed. Although he replied in the affirmative, he was never asked to produce the documents.

31. There is no unconditional obligation on a party, whether employer or union, appearing as a respondent before this Board to adduce in evidence all documents relevant to a complaint. A union charged with counselling or procuring an unlawful strike may satisfy the Board of its innocence through the oral evidence of an officer or officers with knowledge of the facts alleged; if their testimony is credible the union need not adduce all correspondence, memos, minute books and business records in its possession to purge the accusations. In proceeding before this tribunal, it is for the parties to determine what evidence they will advance to make their case and for the tribunal to determine whether, on the whole of the evidence, the case is made.

32. We find the evidence in the case of the respondent to be credible and compelling when viewed in its entirety. The evidence establishes that beginning in 1979 the company began to implement a new production strategy. Its goal was the achievement of greater efficiency

through an increased specialization of product lines in its plant. Its experience with the Brantford plant justified the decision to purchase a plant in Cornwall.

33. In can scarcely be suggested, as was the case in *Westinghouse*, that the company was looking for a way to operate union free. The unchallenged evidence is that the entire textile industry in Cornwall is organized by the Amalgamated Clothing and Textile Workers Union. In choosing the Cornwall location the company had little doubt that its new plant would soon be unionized — an expectation which quickly materialized. A Board certificate issued to the A.C.T.W.U. for bargaining rights in the Cornwall plant on December 18, 1980 (Board File No. 1843-80-R).

34. To say that the respondent didn't attempt to make its operations union free is not, of course, a complete answer to this complaint. In any case it would be a violation of the Act to lay off employees as a reprisal for the exercise of their lawful rights, including the right to strike. The union called evidence to establish that the reduction of operations at Hawkesbury was implemented as a reprisal for the union's strike. Joseph Tomiczek, an employee of the respondent in Brantford, gave evidence that on one occasion after the strike the superintendent of his department, Bill Hempel, commented that because of the level of sabotage taking place at Hawkesbury, there would probably be a gradual phasing out of the Hawkesbury operation. Later, in late September or early October of 1981, Mr. Hempel told Mr. Tomiczek that Hawkesbury would probably continue to run for a while because the company had got rid of all the people that were causing problems.

35. There is no evidence to suggest what knowledge, if any, Mr. Hempel has of company decisions beyond the level of his department in Brantford. It is difficult to place this evidence above the level of the idle comment of a departmental supervisor in a plant hundreds of miles removed from Hawkesbury. Moreover, if militancy during the strike is what Mr. Hempel meant by people causing problems, there is little evidence to substantiate a company scheme to rid itself of the troublemakers. The evidence establishes that except for its president, Florent Lariviere, a fairly junior employee elected in the fall of 1980, virtually all of the union executive are still at work in the Hawkesbury plant. The evidence does not disclose any systematic elimination of the employees who supported the strike or who were criminally prosecuted for acts of violence during the strike. While the evidence of Mr. Lariviere and of Mr. Jean Villeneuve, his predecessor as president of the local, give the Board some concern for the respondent's judgment in how to deal with its employees and their elected representatives, we cannot find in their evidence, or in any evidence adduced by the union, the kind of proof that would undermine the respondent's case or sustain the broad allegations made in this complaint.

36. In addition to retaining a large number of employees who were obviously dedicated union supporters, the respondent has made a substantial commitment of capital to the Hawkesbury plant, totalling some four million dollars in value since the conclusion of the strike. While the strike caused the company to lose some of its market share, a factor contributing to some extent of the layoffs in January and February of 1981, the evidence shows a pattern of genuine effort on the part of the company to minimize the impact on employment levels at Hawkesbury and to maintain the facility's capacity to respond to such demands for its product as sales allow.

37. The evidence of Mr. Thompson respecting the economic decline in the synthetic

fibres industry in North America went virtually unchallenged. If the union had wished to dispute the mass layoff of employees of the respondent's competitor in Hawkesbury or of its own employees in Roanoke, Alabama, it could easily have done so. Unchallenged evidence of that kind, coming as it does from the president of the respondent's company, an individual responsible for monitoring the economic conditions in the industry, is evidence which this Board accepts. On the whole we found Mr. Thompson to be a credible witness. He was forthright in his demeanor and was neither evasive nor contradictory in his responses.

38. In our opinion the facts in this case are clearly distinguishable from those considered by the Board in *Westinghouse Canada Limited*. In that case the Board was required to consider whether the duty to bargain in good faith had been violated by the respondent in the formulation of a decision to relocate part of its operation from a unionized plant in Hamilton to number of non-unionized, decentralized plant sites. While the Board concluded that the company's decision was not sufficiently finalized to require disclosure of its plans to the union, and thus dismissed the section 15 allegation, the Board made the following observation:

39. Collective bargaining during the prescribed 'open period' is the preferred vehicle for establishing terms and conditions of employment for establishing terms and conditions of employment in this jurisdiction. With the exception of union recognition and inter-union jurisdictional disputes the scope of matters which may be bargained to impasse in this jurisdiction, as contrasted to bargaining under the *National Labour Relations Act*, is virtually unlimited as is seen from the statutory definition of collective agreement. A collective agreement is defined in the Act as an agreement in writing containing provisions respecting terms and conditions of employment or the rights, privileges or duties of the employer, the employers' organization, the trade union or the employees and under section 14 of the Act the parties are required to bargain in good faith and make every reasonable effort to make a collective agreement. Once an agreement is reached, however, the parties are bound to it for its stipulated term and are prohibited from engaging in economic sanctions during its term regardless of changing economic conditions or management initiatives. The restrictions place upon a trade union in this regard are to be contrasted with the freedom allowed under section 152 of the *Canada Labour Code*, c. L-1 which permits a trade union to bargain to impasse about the effects of technological change occurring during the term of a collective agreement. Having regard to the importance of the exercise, the requirement for full and open discussion, the scope of matters open to bargaining and the statutory framework which binds the parties to the terms of their agreement for its full term, can there be any doubt that the section 14 duty requires an employer to respond honestly when asked in bargaining if he is contemplating initiatives of the type which have a real likelihood of significantly impacting on the bargaining unit. Similarly, can there be any doubt that an employer is under a section 14 obligation to reveal to the union on his own initiative those decisions already made which may have a major impact on the bargaining unit. Without this information a trade union is effectively put in the dark. The union cannot realistically assess its priorities or formulate a meaningful bargaining response to matters of fundamental importance

to the employees it represents. Failure to inform in these circumstances may properly be characterized as an attempt to secure the agreement of the trade union for a fixed term on the basis of a misrepresentation in respect of matters which could fundamentally alter the context of the bargain.

39. As the foregoing paragraph discloses, it is inconsistent with the duty to bargain in good faith for an employer to bargain with a union in respect of terms and conditions of employment for work which it has, unbeknownst to the union, already decided to terminate during the term of the collective agreement being negotiated. Obviously, for example, it would reflect less than good faith to obtain concessions from a union in bargaining in return for a more generous wage package deferred to a second year of the contract if a corporate decision had already been made to close the plant so that the bargaining unit would no longer exist in that second year.

40. The duty to bargain in good faith, central as it is to the collective bargaining process, is a delicate concept which must at all times be dealt with by the Board with care and restraint. In *Westinghouse* the Board was careful to restrict the duty of disclosure to the circumstances described. It specifically alluded to the sensitive nature of corporate and business decision-making in a collective bargaining context, noting that it would risk a serious distortion of the bargaining process to impose a general obligation on employers to advise unions of plans which might never be implemented. It recognized that often the open-ended discussion of uncertain contingencies at the bargaining table could have serious negative industrial relations consequences. To require the employer during the bargaining process to discuss every plan and possibility in the company's contemplation would raise non-issues to the level of issues. It would frustrate the ability of the parties to come to grips with real problems by raising the unnecessary spectre of threats and possible litigation.

41. The concerns expressed by the Board in *Westinghouse* have a similar application in the facts of this case. Counsel for the union questions the extent to which the company can, during bargaining, keep to itself a major decision which has been taken on the relocation of work and the alteration of its production strategy. The issue is whether the duty to bargain in good faith is violated when a decision of that kind is taken and the employer does not discuss it in bargaining because it believes that its decision will not adversely affect the job security of employees or the bargaining interests of their union.

42. In *Westinghouse* the Board addressed the problem of requiring an employer to discuss with a union plans which were still in a formative stage. To the extent that a final decision has not been made it would, for the reasons expressed in that decision, be contrary to positive industrial relations to require the employer to disclose its tentative thinking to the trade union that represents its employees. Things uncertain and which may never come to be need not necessarily be the subject of bargaining.

43. That general principle also applies to a decision that is finalized to the extent that there is no foreseeable impact on the employees or their union. Most private enterprise is a risk taking venture. There is always some element of uncertainty in a business decision. Where a corporate planning decision is made and the employer believes that its decision will not affect its employees there is inevitably some possibility of an error in the employer's prediction. Events beyond the employer's control, such as changes in the economy or the introduction

into the market of competitors or competing products may affect production and sales and, ultimately, the welfare of the company and its employees. Should it follow that any time during bargaining a company make a decision that risks its capital and know-how, and by extension its production, sales and employment levels, it is required to disclose and discuss its business strategy and predictions with the trade union that represents its employees?

44. An affirmative answer to that question would be tantamount to moving the union into the corporate boardroom. While some might see that as a positive step, it is not one which in our view can be conjured out of the statutory duty to bargain in good faith and make every reasonable effort to conclude a collective agreement mandated by section 15 of the *Labour Relations Act*. Collective bargaining under the Act is premised on the exercise of traditional management rights by employers to the extent that those rights are not abrogated by statute or by the terms of a collective agreement. Absent some contractual restriction, it is generally the prerogative of the employer to finance, organize, plan and direct its enterprise in the way that it sees fit. As some recent plant closures have demonstrated, errors of judgment in these areas can be fatal to an enterprise. As part of the scheme of collective bargaining employees and the trade unions that represent them understand and accept that they are generally vulnerable to the success or failure of decisions taken by management, just as they are to market forces beyond their employer's control.

45. In some instances a more enlightened attitude of disclosure and discussion with the union might profit the employer in the long run. Secrecy and mistrust can undermine good labour relations. Communication with the union may produce some positive suggestions to improve the employer's strategy and enhance its chances of success. It may be wise to insure that a union is aware and onside when a major initiative is undertaken. The advisability of communication must, however, depend on the sophistication of the parties and the overall quality of their bargaining relationship. There is a difference between what is advisable or desirable from a labour relations standpoint, and what is the minimum required by the Act. In our view, it would be unrealistic and unresponsive to the sensitive nature of collective bargaining relationships to require employers to bargain with their unions about corporate decisions made in the belief, held in good faith and on reasonable grounds by the employer, that employees will not be adversely affected. In those circumstances the degree of disclosure remains in the discretion the employer.

46. Considerable latitude must be given to management in the exercise of its judgment. In the instant case the respondent decided to reorganize its production in a way which it believed would maximize productivity without substantially jeopardizing existing jobs at the Hawkesbury plant. It did not advise the union of its plans because it did not believe that there would be any adverse impact on its employees. The evidence before the Board does not disclose that the implementation of the respondent's plans did adversely affect the complement of employees at Hawkesbury. Previous growth and the introduction of the meltspin operation suggested to the company that the opening of a plant in Cornwall would not cause any substantial loss of employment at Hawkesbury. We are satisfied that the respondent's belief was held in good faith and was based on reasonable grounds. The evidence establishes that when the lay off of 131 employees took place in Hawkesbury in September of 1981, almost a full year after the end of the strike, sales were depressed, inventories were high and economic conditions in the textile industry generally and the carpet industry particularly had taken a serious downturn. Having regard to the whole of the evidence we are satisfied that those are the reasons, and the only reasons, for the layoff of the employees of the respondent at

Hawkesbury. There is no causal connection between the decision to open a plant in Cornwall and the layoff of the respondent's employees.

47. For the foregoing reasons the Board finds that the respondent did not violate the duty to bargain in good faith and did not lay off or terminate its employees at Hawkesbury out of any anti-union motive or in violation of the provisions of the *Labour Relations Act*. The complaint is therefore dismissed.

DECISION OF BOARD MEMBER S. COOKE;

1. The decision of the company to expand its operations into Brantford and Cornwall was taken according to the evidence for the purposes of expanding the company ability to meet larger customer demand and to increase the product run thereby reducing changeovers resulting in lower cost.

2. This information had it been transmitted to the union early, i.e. before the difficult set of bargaining including the protracted strike, would have allowed the union and the workers it represents to understand and accept the motives of the company. The withholding of the information only heightens suspicion particularly when the above circumstances were followed by three layoffs.

3. I do not agree with the majority in its reasoning in paragraphs 40 through 45.

4. The absence of the best communication however, unless it can be shown to be a part of a deliberate plan to avoid agreement does not constitute a violation of the duty to bargain in good faith.

5. The complainant was able to show a history of behaviour by the respondent company that increased suspicion and mistrust of the workers but it did not show a breach of the duty to bargain in good faith or that the workers were terminated or laid off in violation of the provisions of the *Labour Relations Act*.

1216-81OH; 1261-81OH Walter Doupagne, Complainant v. Baltimore Aircoil of Canada, Respondent

Health and Safety – Complainant refusing to follow express instructions of employer – Adopting own work methods – Whether conduct caused by safety concerns – Whether Act protecting employee insubordination short of refusal to work – Whether complainant disciplined because of exercise of rights under Act

BEFORE: Kevin M. Burkett, Alternate Chairman and board Members W.H. Wightman and C.A. Ballentine.

APPEARANCES: Paul Falkowski, Ken Valentine, Walter Doupagne, Ronald Hiltz, Lorne Heard, Brian Shell and Gerry Barr for the complainant; J.P. Wearing and R. Hampton for the respondent.

DECISION OF KEVIN M. BURKETT, ALTERNATE CHAIRMAN AND BOARD MEMBER W.H. WIGHTMAN; March 5, 1982

1. The Board directs that the above complaints be and the same are hereby consolidated.

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3. The complainant alleges that he has been dealt with by the respondent contrary to the provisions of Section 24(1) of the *Occupational Health and Safety Act*, R.C.S.O. 1980, (hereinafter referred to as "the Act").

4. These complaints arise out of a two-day suspension imposed on Mr. Walter Doupagne on July 22, 1981 and a subsequent two-week suspension imposed on Mr. Doupagne on August 28, 1981. The first suspension was imposed in response to an incident which occurred on July 21, 1981 pertaining to the use of a fan by an employee who was welding at the time. The July 22nd letter advising Mr. Doupagne of this suspension is over the signature of Mr. R.J. Hampton, the company's General Manager and reads:

I am very reluctantly obliged to put on record, the fact that despite numerous informal warnings, you are continuing to allow welding to take place without using the smoke extraction equipment provided.

I would point out that under the Occupational Health and Safety Act, you as the Senior Mechanic in the area, have a clear responsibility to encourage safe work practices. This would include such practices as encouraging other employees to follow your lead in using such equipment.

The use of this smoke equipment has been discussed at length with the Ministry of Labour and its use when available is mandatory in our plant.

When the equipment was installed a meeting was held to discuss it. The seriousness of smoke pollution control was pointed out from both the legal and environmental viewpoints. I am sure you are aware of this.

Since that time five instances are on record when the subject was brought to your attention. I am sure there have been other times when it was not noted.

The Company regards your ignoring instructions related to this subject (Health and Safety) very seriously, and accordingly, you are suspended from work for two days – July 23rd and 24th, 1981.

I must point out that further disregard on your part or failure to take reasonable efforts with regard to personnel in your area may result in further discipline up to and including discharge.

The second suspension was imposed in response to an incident pertaining to the use of company supplied ear plugs which occurred on August 27, 1981. The August 28th letter advising Mr. Doupagne of this suspension, also over the signature of Mr. Hampton, reads:

I have very carefully reviewed the incidents concerning the use of new ear plugs in the coil area with all the people concerned including yourself.

In my opinion the issue is not which ear plugs work the best, but, rather relates to attitude towards plant supervisors and your general reaction to the change.

The following points seem beyond dispute.

1. If the new plugs were unsatisfactory you could easily have discussed the matter in a normal way with your supervisor – you did not.
2. When told you were disobeying a direct instruction to wear them you replied in a rude manner and again declined to discuss the matter. In fact you indicated you were going to continue to wear the old ones regardless.
3. In your words and actions you demonstrated your contempt for plant supervision.
4. By example at least you encouraged others not to wear these ear plugs.

I regard this matter as extremely serious since we cannot run a company without respect for authority and the cooperation of senior employees. You should know that *discharge* was seriously considered since a two day suspension was given in July. You will also no doubt remember our own discussion regarding attitude at this time.

In the circumstances you will be suspended from work for two weeks effective August 31, 1981. I'm not taking further action, I have taken account of your years of seniority here as well as all the other items I regard as relevant.

5. Mr. Doupagne has been employed by the company for approximately 10 years. He has worked in the Mechanic-I (M-I) classification for the past seven years. A person occupying the M-I classification performs a function analogous to a lead hand in that he is responsible for giving on-the job instruction and advice to a small crew. At the time of the two suspensions with which we are concerned there were three other employees in Mr. Doupagne's crew. The crew performed work on the coil line which involved a considerable amount of welding. Mr. Doupagne had complained about the smoke in the work area about two years before. The company responded by installing exhaust ducts in the plant. When this method of smoke extraction did not prove entirely satisfactory, the company purchased and installed a number of portable smoke extractors. These devices draw the smoke from the point at which a weld is being made and filter it. The evidence establishes that if the nozzle of the smoke extractor is maintained 8" to 10" from the point at which the weld is being made over 90% of the welding smoke will be drawn into the device and filtered. One of these devices was installed in the coil line area. A standard room fan had been used by the welder in the area prior to the introduction of the portable smoke extractor. Presumably, it had been used to both cool the welder and blow the welding smoke away from his face. The evidence is that the fan continued to be used after the smoke extractor was in place with the result that smoke that would otherwise have been filtered by the extractor was blown by the nozzle and into the work environment.

6. Mr. Coupagne was told in June by Mr. R. Smith, the plant foreman, that the fan should not be used where it interferes with the smoke extractor. He was again told on the morning of July 21st by Mr. Watters, a group leader, on instruction from Mr. Tenage, the plant superintendent, that the fan which was being used by one of the welders in his crew should be turned off because it was interfering with the operation of the smoke extractor. Mr. Doupagne acknowledged in cross-examination that he had received the order and that he had not complied with it. Mr. Tenage accompanied a Ministry of Labour safety inspector on an inspection of the plant that same afternoon. As he passed the coil line, Mr. Tenage observed that the fan, which he had directed be shut off that morning, was still being used and was continuing to interfere with the operation of the smoke extractor. He again directed Mr. Watters to instruct Mr. Doupagne to have the fan shut off. The group leader told Mr. Doupagne that the Ministry inspector had ordered it shut off. Mr. Doupagne refused to have the fan shut off and said that he wanted to speak with the inspector. He approached the inspector who told Mr. Doupagne that the fan could be used only so long as it did not interfere with the smoke extractor. The fan was then shut off and has not been used since.

7. Mr. Doupagne was asked in cross-examination if he shut the fan down when asked to do so. He replied in the negative and testified that he wanted to know why Mr. Tenage wanted it shut off because he considered it an unreasonable request. He was then asked if he asked Mr. Tenage for a reason or just refused and he replied that he simply refused. He was asked why he refused to turn the fan off when asked to do so by the group leader and replied that he wanted to speak with the inspector. Mr. Doupagne testified that without the fan "it was too hot." The welder who was doing the actual welding testified that the removal of the fan caused him to take additional breaks. He did not claim that his health or safety was endangered. Mr. Doupagne also testified that the fan was blowing the excess smoke away but admitted that he never discussed the existence of excess smoke with the inspector. The company responded to this incident by suspending both Mr. Hilts, the welder, and Mr. Doupagne for two days. The letter advising Mr. Doupagne of his suspension has been set out.

8. We now turn to the facts relating to the second suspension imposed on Mr.

Doupagne. Mr. Doupagne returned from his vacation on August 24th to find that during his absence the company had supplied its employees with a different type of ear plug than that which had been supplied prior to his vacation. The company, after investigating the matter, decided to supply a reusable soft plastic type in place of the disposable sponge type that had been supplied. The evidence is that both types of ear plug have a satisfactory decibel rating; although the reusable type has a better decibel rating. The company explained that the disposable type had to be hand formed and because of the amount of oil and grease in the work place, often became dirty. The company was told by the manufacturer that the reusable type of ear plug would fit the vast majority of ear canals. With the exception of Mr. Doupagne, no other employee has complained about the reusable plugs. It is accepted that in order to be fully effective, any ear plug must fit the ear canal.

9. Mr. Doupagne testified that he tried the reusable plugs for a day and a half and experienced increased noise levels because he couldn't get a perfect fit in the left ear canal. He did not raise his concern with anyone from the company. Indeed, he went to the stockroom and asked for a supply of the disposable sponge ear plugs. He was told by the storekeeper that he had been ordered not to release the disposable plugs. However, Mr. Doupagne insisted that he be supplied and demanded a box of the disposable type. The storekeeper reluctantly complied. Mr. Doupagne then returned to the coil line and he, along with the other members of his crew, began to use the disposable type. The storekeeper immediately advised Mr. Tenage, the plant superintendent, and Mr. Smith, the general foreman, of what had transpired. They in turn proceeded to the coil line where they found Mr. Doupagne and his crew wearing the disposable ear plugs. Mr. Tenage testified that he told Mr. Doupagne that he was disobeying a direct order to which Mr. Doupagne replied that he didn't care, the old ones were better, and the new ones "good for only 24 decibels". It was explained to Mr. Doupagne that he had misunderstood the meaning of the decibel rating. The decibel rating refers to the decibels of sound which are blocked by the plug and not the decibel level above which the plug is ineffective. Mr. Smith corroborated Mr. Tenage's evidence with respect to the exchange which took place at the coil line. Mr. Doupagne, while acknowledging the misunderstanding with respect to the decibel rating, maintained that he told Mr. Tenage at the time that the reusable ear plugs were unsafe and that he was not getting adequate protection. He also testified under cross-examination that he figured he should have a choice in the matter. Both Mr. Tenage and Mr. Smith denied that Mr. Doupagne made any reference to safety or claimed that the reusable plugs were ineffective. Mr. Doupagne was given the two week suspension in response to this incident.

10. The company argues that Mr. Doupagne, in acting as he did, was not exercising rights protected under the Act. The company maintains that Mr. Doupagne was being insubordinate on both occasions and cannot now rely upon the protection provided under the Act to employees who respond to danger in the work place. The company asks the Board to find that Mr. Doupagne, who was responsible for the direction of those in his crew, was told by the company to discontinue the use of the fan so as not to interfere with the smoke extraction equipment and refused. He disregarded the instruction of Mr. Smith, disobeyed the direction of Mr. Tenage, as conveyed through the group leader, and ignored the request of the group leader without first seeking out the safety inspector. In the absence of any real or imagined safety threat the company asks the Board to find that it responded in accord with its established plant rules and disciplined Mr. Doupagne for insubordination. It is argued by the company that the ear plugs supplied by it to Mr. Doupagne upon his return from vacation meet the requirements of the Act pertaining to hearing protection. In the absence of any attempt by Mr. Doupagne to advise the company that he considered the reusable ear plugs unsuitable

prior to taking matters into his own hands, the company asks the Board to find that Mr. Doupagne was disciplined for exhibiting an unsatisfactory attitude and not for exercising any right under the Act. The company also maintains that the employee response which is protected under the statute is a refusal to work. Even if Mr. Doupagne had reason to believe he was endangered, which the company denies, he did not refuse to work but acted unilaterally and contrary to company instruction, and in these circumstances, the company maintains that he cannot rely upon the protections afforded employees under the Act.

11. The union argues that an employee is not limited to a refusal to work if he perceives danger in the work place. The union maintains that an employee can take any number of steps of causing a disruption in production and still claim the protections of the Act if the employer moves against him. The union, relying upon Section 14(2)(a)(c) and (g) of the Act, argues that the company must show in this matter that it gave Mr. Doupagne the same level of training in the use of smoke extractor equipment as was given the welders. The union argues that the legal burden is upon the company and in order to succeed it must show that Mr. Doupagne was properly instructed in the use of the smoke extractor equipment. It is the union's submission that the company, not Mr. Doupagne, was delinquent in this matter and that Mr. Doupagne as an employee in the M-1 classification acted properly and should not have been disciplined. Turning to the incident with respect to the ear plugs. The union argues that Mr. Doupagne perceived a difference in the noise level he was subjected to while wearing the reusable ear plug and suggests that until it can be proven otherwise it must be accepted that the reusable plugs did not fit Mr. Doupagne. The union, referring to section 17(2)(b) and 14(2)(g) and regulations 83 and 134(b), argues that it was incumbent upon the employer to train Mr. Doupagne in the use of protective devices. The union argues that in this case there should have been a test taken by the employer in order to determine if the ear plug was working properly when used by Mr. Doupagne. The union asks the Board to find that the reusable ear plugs issued to Mr. Doupagne in August did not fit him properly, that he advised the company of this fact and, in contravention of section 24 of the Act, was disciplined for so doing.

12. Section 24 of the Act protects a worker from reprisals by an employer because the employee has acted in compliance with the Act. Section 24(1) provides:

No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

A worker who complains that section 24(1) of the Act has been contravened may have the matter dealt with by final and binding arbitration or by the Ontario Labour Relations Board.

Section 24(5) provides that on an inquiry by the Board the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection 1 lies upon the employer or the person acting on behalf of the employer. It is to be noted that the burden is one of establishing that the actions complained of were not in the nature of a reprisal prohibited under section 24. The employer does not have to establish that he has not violated one of the substantive sections of the Act, as suggested by the union. The enforcement of the employer's duties under the Act are otherwise provided for. The Board's jurisdiction is limited to the issue of an employer's response to the lawful exercise of employee rights under the Act. The Board is empowered under section 24(7) to substitute such other penalty for the discharge or discipline, even where the worker has been discharged or otherwise disciplined for cause, as to the Board seems just and reasonable in the circumstances.

13. Under section 23 of the Act a worker is given the right to refuse to work where his health or safety, or that of a fellow worker, is endangered. A worker may refuse to work or do particular work where he has "reason to believe" that by performing the work he is likely to endanger himself or a fellow worker. The section establishes a procedure under which the worker is required to promptly report the circumstances of his refusal to his employer or supervisor who in turn is required to investigate. If, following the employer's investigation, the work continues to have "reasonable grounds to believe" that by performing the work he is likely to endanger himself or another worker, a Ministry inspector is called and, under the section, "shall . . . decide whether the machine, device, thing or the work place or part thereof is likely to endanger the worker or another person."

14. The employer argues that the only worker activity which is protected from employer reprisal under section 24 of the Act is a refusal to work as provided under section 23 of the Act. The Board, in deciding otherwise, stated in *Adelaide Building Services*, [1980] OLRB Rep. July 933:

That provision does not, on its face, limit its protection or application to situations where a worker has refused to perform work. The Act itself speaks to matters other than refusal, and, among their things, imposes a variety of obligations upon constructors, employers, supervisors, workers, owners and suppliers (see Part III of the Act). A worker who is trying to comply with the provisions of this Act by fulfilling his obligations under section 17, or who is trying to seek enforcement of this Act by getting his employer or supervisor to fulfill the obligations set out in sections 14, 15 and 16 of the Act, is no less entitled to the protection of section 24(1) than is the person who refuses to perform work.

15. Although the protection afforded an employee under section 24 extends beyond a refusal to work, it is necessary to consider the extent to which the Act permits employee insubordination. Under section 23 of the Act an employee is expressly entitled to refuse to do whatever work he has been ordered to do where the preconditions set out in the section have been satisfied. Nowhere else in the Act can there be found an express entitlement to engage in insubordination. Under section 17(2)(b) a worker is under a statutory obligation not to work in a manner that may endanger himself or another worker. This section, considered in isolation, may be read as creating an implied entitlement to engage in insubordination to the extent that a worker, regardless of the instructions of his employer, is required to work in a manner that does not endanger himself. However, when section 17(2) is read in the context of

the Act as a whole, we are unable to conclude that it creates an independent entitlement to refuse to obey the instructions of the employer beyond that contained in section 23 of the Act. The duty of an employee under section 17(2) is not new. It existed under section 27 of the *Industrial Safety Act*, 1971 S.O. 1971 c. 43. It was never viewed as conferring a right to refuse to work. That right was enacted for the specific purpose and to be applied in the specific circumstances described in section 23 of *The Occupational Health and Safety Act*. Where an employer is subject to a written or verbal instruction and he has reason to believe that by complying with the instruction in the carrying out of his work he is likely to endanger himself, he is entitled to refuse to do the work in the manner directed.

16. The distinction between section 17(2) and section 23 is critical to the scheme of the Act. A refusal to work under section 23 triggers the carefully constructed mechanism established under that section for resolving situations which are perceived by an employee as posing a danger to his health and safety. If an employee simply disregards the instructions of his employer and takes it upon himself to establish his own procedure for doing the work, the initial problem may not be identified as posing a threat to his health and safety or that of any other employee subject to the same instruction. Furthermore, the resources which the Act contemplates be brought to bear (employer investigation and follow-up and, if necessary, the involvement of an inspector) may not be, to the potential detriment of workers. Where a worker is acting within the bounds of his own discretion, section 17(2)(b) obligates him not to work or operate equipment in a manner that may endanger himself or a fellow worker. However, where a worker is acting under a specific instruction, oral or written, and he has reason to believe that by complying with that instruction he may endanger himself or a fellow worker, he complies with section 17(2)(b), not by unilaterally substituting his own work method for that laid down by his employer, but rather, by availing himself of the right under section 23 to refuse to do work which may endanger himself or another worker. The administration of the Act in this way enhances worker safety by promoting immediate disclosure, discussion and inspection rather than resort to ad hoc solutions and the potential for hazardous situations to go undetected. With this general understanding of the scheme of the Act, we turn to the merits of this complaint.

17. The relevant parts of sections 14, 15, 16 and 17 are set out below.

14. (1) An employer shall ensure that,

- (a) the equipment, materials and protective devices as prescribed are provided;
 - (b) the equipment, materials and protective devices provided by him are maintained in good condition;
 - (d) the equipment, materials and protective devices provided by him are used as prescribed;
- (2) Without limiting the strict duty imposed by subsection 1, an employer shall,
- (a) provide information, instruction and supervision to a worker to protect the health or safety of the worker;

- (g) take every precaution reasonable in the circumstances for the protection of a worker;
- 16. (1) A supervisor shall ensure that a worker,
 - (b) uses or wears the equipment protective devices, or clothing that his employer requires to be used or worn;
- 17. (1) A worker shall,
 - (b) use or wear the equipment, protective devices or clothing that his employer requires to be used or worn;
 - (c) report to his employer or supervisor the absence of or defect in any equipment or protective device of which he is aware and which may endanger himself or another worker.
- (2) No worker shall,
 - (b) use or operate any equipment, machine, device or thing or work in a manner that may endanger himself or any other worker;

Regulations 83, 134(b) and 144 provide as follows:

83. A worker required to wear or use any protective clothing, equipment or device shall be instructed and trained in its care and use before wearing the protective clothing, equipment or device.

134. A worker who may be exposed to a biological chemical or physical agent which may endanger his safety or health shall be trained,

- (b) in the proper use and care of required personal protective equipment;

144.(1) In this section, "decibel" means decibel measured to a type 2 sound level meter conforming to the standard Z107.1 of the Canadian Standards Association operating on the A-weighting network with slow meter response.

(2) Where a worker is exposed to a sound level of 90 decibels or greater,

- (a) measures shall be taken to reduce the sound level below 90 decibels; and
- (b) where such measures are not practicable,
 - (i) the duration of exposure set out in Column 2 of the Table

in subsection 5 shall not exceed the duration shown for the particular sound level set opposite thereto in Column 1 of the Table in subsection 5, or

- (ii) the person shall wear hearing protection.
- (3) Where a worker is exposed to a sound level of 115 decibels or greater, he shall wear hearing protection.
- (4) Clearly visible warning signs shall be posted at the approaches to an area where the sound level is more than 90 decibels.
- (5) The warning signs referred to in subsection 4 shall state,
 - (a) the daily exposure for the particular sound level permitted by the following Table; and,
 - (b) that hearing protection must be worn when the daily exposure is more than that permitted for the particular sound level.

TABLE

COLUMN 1	COLUMN 2
Sound Level — in Decibels	Duration — Hours per 24 hour Day
90	8
92	6
95	4
97	3
100	2
102	1½
105	1
110	½
115	¼ or less
Over 115	No exposure

- (6) Where hearing protection is required by this section, the protection shall be sufficient to reduce the sound level below the sound level in Column 1 of the Table in subsection 5 for the exposure corresponding to that sound level in Column 2 of the Table in subsection 5.

18. The first issue to be determined is whether Mr. Doupagne was disciplined on July 22, 1981 because he was acting in compliance with the Act. We are satisfied on the evidence that as part of his job responsibilities as Mechanic-1, Mr. Doupagne is required to direct those in his crew in accord with company policy and the directives of more senior management. Mr. Doupagne was told in June by Mr. Smith, the general foreman not to operate the fan in a

manner that interfered with the smoke extractor. Even if we accept that Mr. Doupagne did not understand the implications of that instruction, he was given an express instruction by Mr. Watters, the group leader, on the morning of July 21st. He was told to get the fan down and he failed to comply or direct the welder to comply or to identify a concern for the health and safety of the welder. Indeed, there is no evidence before us that the health or safety of the welder or anyone else in his crew was in danger at the time. Under section 24 of the Act an employee may refuse to work or do particular work where he has reason to believe that he is likely to endanger himself or another worker by doing the work he has been directed to do. Other than for the exception enunciated in section 24, there is nothing in the Act which allows an employee to refuse to follow the instructions of his employer. Mr. Doupagne refused to follow the instruction given by Mr. Watters on the morning of July 21st and cannot rely upon the Act in defence of his actions.

19. When confronted by the group leader on the afternoon of July 21st he again refused to follow the instruction of a supervisor and instead sought out the inspector who, he had been told, had directed the fan be shut off. In the absence of evidence to show that the company may have been in violation of the Act or that the smoke emissions (which the fan was causing to blow into the atmosphere) or the heat, posed a threat to health and safety, we do not believe that Mr. Doupagne, given his earlier refusal to obey the same instruction, sought out the inspector for the purpose of having the Act enforced.

20. This is not a case where the inspector was called to deal with a matter which an employee genuinely perceived to pose a threat to his or a fellow employee's health or safety or to constitute a violation of the Act. We are satisfied on the evidence that Mr. Doupagne sought out the inspector because he did not believe that the inspector had made an order which he considered to be unreasonable. The fact that Mr. Doupagne may not have received the same level of training as the welders, a fact relied upon by the complainant, is irrelevant. Notwithstanding the misstatement of the nature of Mr. Doupagne's insubordination in Mr. Hampton's letter of July 22nd, we are satisfied that Mr. Doupagne was given a two-day suspension on July 22nd for reasons other than acting in compliance with the Act or Regulations. Accordingly, we hereby find that the suspension given him on July 22nd does not constitute a violation of section 24 of the Act.

21. We now turn to the suspension imposed on Mr. Doupagne on August 22nd in connection with the use of the reusable ear plugs. Before dealing with the merits of this complaint it is helpful to review the statutory framework as it pertains to the provision and use of protective devices or clothing. A reading of the sections of the Act and the Regulations relied upon by the union makes it clear that protective devices are provided by the employer and must be worn or used by the worker. Section 14(1)(a) imposes on an employer the duty of ensuring that the protective devices as prescribed are provided and section 14(1)(d) imposes a duty on an employer to ensure that the protective devices provided by him are used as prescribed. Section 16(1)(b) imposes on a supervisor the duty of ensuring that a worker uses or wears the protective devices that his employer requires to be used or worn. Section 17(1)(b) imposes a duty on a worker to use or wear the protective devices or clothing that his employer requires to be used or worn. The statutory protection afforded an employee in the event he is not provided with the protective devices he requires or the protective devices he is provided with are defective is contained in section 17(1)(c) of the Act. Under that section a worker is under a duty to report to his employer or supervisor the absence of or defect in any protective device of which he is aware and which may endanger himself or another worker.

22. Under section 17(2)(b) a worker is under a statutory duty not to use or operate any equipment, machine, device or thing or work in a manner that may endanger himself or any other worker. Section 24, as discussed, establishes the right and the procedure under which a worker is entitled to refuse to do work which he has reason to believe is likely to endanger himself or another worker. As we read the Act there is a positive obligation on the employer to provide the protective devices which are prescribed or required and an equally positive obligation on the worker to use or wear protective devices. If the prescribed or required protective devices are not provided or are defective the worker is under an obligation to report this fact to his employer and, failing a corrective response, may be entitled to avail himself of the protections provided under section 24; that is, he may be entitled to refuse to work. There is nothing in the Act which entitles a worker to refuse to use or wear the protective devices supplied by his employer or, on his own initiative, to substitute protective devices of his own choosing for those provided by his employer.

23. It is against this backdrop that we must now review the decision of the employer to suspend Mr. Doupagne for two weeks effective from August 28, 1981. The evidence establishes that the employer, although he changed from providing a disposable type of ear plug to a reusable type, continued to provide hearing protection which satisfied the requirements of Regulation 144 of the act. Mr. Doupagne testified that he could not obtain a proper fit in the left ear canal with the reusable type and was being subjected to a higher noise level than with the disposable plugs. He testified that he informed Mr. Tenage of this problem. Mr. Tenage testified that he was never informed of the difficulty with respect to proper fit but rather, it is his evidence that Mr. Doupagne took the position, on the basis of his misunderstanding of the decibel rating, that the reusable plugs were inferior. His evidence in this regard was corroborated by Mr. Smith. Regardless of whose evidence we accept with respect to what was said between Mr. Doupagne and Mr. Tenage, and we prefer that of Mr. Tenage, the fact remains that prior to reporting to his supervisor, or in any way making the company aware of his difficulty with the reusable ear plugs, Mr. Doupagne took it upon himself to demand a supply of the disposable ear plugs from the store clerk and to use the disposable type contrary to the instructions he had been given.

24. There is nothing in the Act which entitles an employee to disregard the instructions of management by declining to use or wear the protective devices supplied and, on his own initiative, substituting a different type of protective device. As we have observed, a worker is under a duty to report the absence of or defects in protective devices. Furthermore, a worker is entitled to refuse to work where he has reason to believe that he may endanger himself or a fellow worker. Mr. Doupagne did none of these things. He took matters into his own hands and in so doing did not act in compliance with the Act.

25. The complainant relies in part on Regulation 83 which stipulates that a worker required to wear or use any protective device shall be instructed and trained in its care and use before wearing it. The union argues that under this regulation it was incumbent upon the employer to test Mr. Doupagne in order to satisfy itself that the ear plugs it had issued were effective and, having failed to do so, it cannot discipline Mr. Doupagne for securing ear plugs which were effective. Even if it could be said, which it cannot, that failure to comply with Regulation 83 allows an employee to act in a manner not contemplated by the Act and to claim the protections of the Act, we do not accept that Regulation 83 requires a company to perform the type of testing suggested by the union in this case. Having satisfied itself with respect to the decibel rating, the regulation, as we interpret it, would require the employer to

instruct his employees with respect to how to insert the ear plugs and maintain them in a sanitary state. If the plugs proved ineffective, as claimed by Mr. Doupagne, it was incumbent upon him to report his concern to his employer and not to work in a manner that may have endangered himself. For the reasons enunciated in paragraphs 15 and 16 herein, even if Mr. Doupagne genuinely felt his health and safety threatened, he was required to report his concern or refuse to work in accord with section 23 of the Act. If he had done so, the company may have been required to carry out the testing suggested by the complainant. Indeed, if the procedures contemplated by the Act had been followed, independent evidence with respect to the effectiveness of the ear plugs when worn by Mr. Doupagne may have been obtained which may have made it unnecessary to litigate. However, Mr. Doupagne took matters into his own hands and in so doing did not act in compliance with the Act. He acted contrary to the instructions of his employer and was properly disciplined for his insubordinate attitude. Accordingly, his complaint that he was disciplined because he acted in compliance with the Act or Regulations must fail.

26. While we may not have imposed the same discipline upon Mr. Doupagne, it is our view that the penalties imposed by the company are within the bounds of what seems just and reasonable in all the circumstances. We are not prepared to exercise our discretion under section 24(7) of the Act to substitute other penalties for those which were imposed.

27. Having regard to all of the foregoing, these complaints are hereby dismissed.

DECISION OF BOARD MEMBER C.A. BALLENTINE;

1. I dissent from the majority decision in this case. Section 24(5) of the *Occupational Health and Safety Act*, places an onus of proof on the respondent company that it did not act contrary to section 24(1) in disciplining the complainant, Walter Doupagne. I do not believe the company has discharged the onus placed on it. I believe the discipline of Doupagne was for reasons other than those stated by the company.

2. I am disturbed that the majority of this case has ignored some very significant evidence in finding that the complainant, Walter Doupagne, was justly disciplined for insubordination to his superiors, especially on such a very important issue as Occupational Health and Safety. The evidence clearly showed that Mr. Doupagne had been carrying on a campaign for over two years to obtain proper protection from smoke and noise in his work area.

3. Morris Barber, an M-1 Mechanic and Safety Committee Chairman for 2½ years, was the company's first witness. He gave evidence that Doupagne complained about smoke 2½ years ago when he first became Safety Chairman. He said the company brought in the fans and smoke extractors because of Doupagne's complaints. Mr. Tenage, the plant superintendent, confirmed in his evidence that Doupagne had complained for a number of years about the smoke and noise as well.

4. The evidence leading up to the incident on July 21st and the 2 day suspension in confusing and contradictory. Mr. Tenage, the plant superintendent, admitted under cross-examination that he was aware that the welder, Mr. Hilts, in Doupagne's crew had been using the fan since January, 1981 — six months before July 21st. He also admitted he had not personally spoken to Doupagne about the fan but had relayed directions to Doupagne

through the general foreman, Mr. Smith, and the group leader, Pat Watters. Mr. Smith was called by the company's counsel as a witness on September 30th, the first day of hearing. On that occasion he gave evidence that he had spoken to Doupagne on June 30th and July 9th about the fan. He said, "I told him I didn't mind the fan being used, if it wasn't used to blow smoke into the smoke extractor". Mr. Smith was recalled at the January 4, 1982 hearing at which he gave evidence that he had told Ron Hilts, the welder, several times that he had either to move the fan or shut it off. Mr. Smith was questioned with respect to his evidence at the first hearing. He admitted he had told Doupagne the fan could be used. There is no direct evidence from the company's witnesses that Doupagne was ever told to shut off the fan. However, the evidence is that Mr. Tenage had instructed Pat Watters the group leader, to tell Doupagne, but Mr. Watters was never called by the company to give evidence.

5. Mr. Doug Hale, a witness for the complainant on the first day of hearing on September 30, 1981, gave evidence that he met Pat Watters downtown in Georgetown, Ontario, on September 24th at about 9:30 p.m. He stated that Watters told him that if Walt Doupagne won the case at the Labour Board, the company would get him on something else. This evidence was uncontradicted by the company. They had ample opportunity to call Mr. Watters on the second day of hearing. By not calling the group leader, the company has created a very large void in discharging the onus which is placed upon it in this case.

6. Mr. Tenage, the plant superintendent, in examination-in-chief- was asked on two occasions by counsel for the company why Doupagne was suspended for two days on July 22, 1981. He replied, "because he didn't train the welder under him how to use the smoke extractor in a proper manner." Mr. Ronald Hilts, the welder involved in using the fan, was called as a witness for the complainant. He gave evidence that Doupagne had advised him on several occasions that there were complaints about his using the fan. He said about two weeks before the July 21st incident, when he was told for the first time by Pat Watters to shut off the fan, he went to Mr. Smith's office and talked to Russell Smith and Pat Watters. He said, "I asked them how I would use the smoke extractor as there was a problem of anchoring it onto the coils. They said if it doesn't suit Tenage we will have a look at it. I went back to work hoping they would show up and give me advice. Later Russell Smith came up onto the scaffold with me. I explained that the magnet wasn't strong enough to hold the extractor on the coil and I had to use the fan to blow the smoke away. There was no suggestion at all how to use it. The next thing I knew about the situation was July 21st when I was told to shut off the fan. Mr. Hilts stated the fan hasn't been used since, but I have to come down and take more breaks." it is obvious that Doupagne had advised welder Hilts of Mr. Tenage's concerns, and it is also obvious there was direct evidence that no order was given to shut off the fan until July 21st, the day the Ministry of Labour's safety inspector was in the plant.

7. Considering that there wasn't a direct order given Doupagne until possibly July 20th, nor was a direct order given Ronald Hilts until July 21st, the day the inspector was on the plant premises, and considering that the condition of using the fan had existed since January, a six month period, it certainly wasn't unreasonable for Doupagne to approach the inspector to get a ruling on the issue of a fan being used. It is my belief he was exercising his rights under the *Occupational Health and Safety Act* to obtain a proper ruling.

8. I believed that Walter Doupagne was a pain in the neck to the company on the issue of safety protection, going back over two years. On July 21st Mr. Tanage seized upon an opportunity to put Doupagne in his place in the presence of a safety inspector, but he was very

disturbed that Doupagne took it upon himself to approach the inspector on the issue of the use of the fan.

9. It is my position that the complainant, Walter Doupagne, was victimized by the company because he had been a battler for safety conditions and was exercising his right by approaching a Ministry of Labour safety inspector for advice and guidance. The two day suspension should be rescinded.

10. Turning to the second incident where Mr. Doupagne refused to wear the new type of ear plugs and was suspended for two weeks. I agree with the majority in regard to the procedures that a worker should follow when he believes that he may endanger himself or a fellow worker by using or wearing a protective device supplied by the company. Mr. Doupagne may have been at fault for not following the proper procedure when he believed that the reusable ear plugs didn't give him the same protection that the disposable type did. However, there is evidence that Doupagne brought the ear plugs issue to the attention of the Safety Chairman, Morrison Barber. Therefore, it is not exactly correct for the majority to state, as they have in paragraph 22 of the decision, that "Mr. Doupagne took matters into his own hands and in so doing did not act in compliance with the Act." Mr. Barber gave evidence that Doupagne complained that the new plugs were not as good as the old plugs. He told Doupagne he would look into it. Under cross-examination he admitted he never did report back to Doupagne. He said he later learned from the inspector that the plugs were adequate, but he was aware the company had told the employees to use the new ear plugs, but didn't know why this decision was made.

11. Under section 8(2)(c) of the *Occupational Health and Safety Act*, the employer shall cause a joint health and safety committee to be established unless the Minister is satisfied that through a collective agreement a committee is in place. In the instant case the employees presently are not represented by a bargaining agent, therefore it was incumbent upon the company to structure a committee. Under section 8(6)(b) the powers of the Committee are set out. It states in part that the committee should, *make recommendations to the employer and the workers for the improvement of health and safety of the workers*. Mr. Barber said he volunteered to be the Safety Chairman. It was quite obvious from Mr. Barber's evidence that he lacked training and the necessary qualification to be a safety representative under the Act. It was shocking that he was so ignorant of what transpired in the plant involving safety issues. Under cross-examination by the complainant, he revealed that he never read safety reports and documents on the company bulletin board. He didn't know why the fan was used and in fact knew very little about the situation of extractors. He said he didn't know because he wasn't a welder, and of course, as previously stated, he didn't know why the company changed the ear plugs. The ignorance displayed by the Safety Committee Chairman on safety generally, reflects that guidance and instruction to the workers on safety procedures were sadly lacking in the plant.

12. Although there is no bargaining agent in this plant to represent the employees, the complainant "Mr. Doupagne" was ably represented by "Mr. Paul Falkowski" and "Mr. Ken Valentine" of the "United Steelworkers of America". I agree with the union's argument that it is incumbent upon the employer to instruct and train the employees in the use and care of any protective device that a worker is required to wear or use. This is provided for under Regulation 83 of the Act. I do not believe that the company "Baltimore Aircoil of Canada" has carried out its responsibilities in compliance with the *Occupational Health and Safety Act* and, therefore, has violated Section 24(1) of the Act.

13. I believe Walter Doupagne acted reasonably by approaching the inspector from the Safety Branch of the Ministry of Labour and taking his problem to the Safety Committee Chairman. It is not necessary that a worker "refuse to work" to obtain enforcement of the Act and in fact, where workers are not represented by a union in the plant to protect their rights, as in this case, it makes it very difficult for them to enjoy the protection of the Act as envisaged by the Legislature.

14. It is my opinion that the complainant Walter Doupagne, was unjustly disciplined. The Board should have lifted the suspension with full compensation.

2130-81-M Ontario Nurses' Association, Applicant, v. Belleville General Hospital, Respondent

Employee Reference – Union seeking to include classifications excluded from unit in successive agreements – Onus placed on party seeking alteration of status quo – Whether section 106(2) reference appropriate for determining whether employees in unit

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

DECISION OF THE BOARD; March 2, 1982

1. This is an application pursuant to section 106(2) of the *Labour Relations Act* requesting the Board to determine whether the persons occupying the positions of Senior Co-ordinator are employees for the purposes of the Act. Section 106(2) states:

If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all purposes.

2. The respondent employer opposes the application on the ground that:

- (a) the above-noted classifications are not employed in a nursing capacity.
- (b) the classification do not share a "community of interest" with other members of the bargaining unit;
- (c) the O.N.A. is endeavouring to broaden the scope of the bargaining unit as described, in that these positions have existed since 1971 and have never been challenged before; and
- (d) while the employees in these classifications are employed by Belleville General Hospital, many of them do not work at Belleville.

3. In reviewing the above points, the Board would note that paragraphs (a) and (d) are not matters with which the present application would deal in any event, but rather are matters arising under the interpretation of the collective agreement, and are properly dealt with through the process of private arbitration (compare *Nelson Crushed Stone*, [1980] OLRB Rep. Oct. 1500). The issue contained in paragraph (b) is also an issue which does not arise in a section 106(2) application, but rather, only at the time of certification, and is now irrelevant to the position of either party.

4. The issue before the Board in this application is whether the persons in dispute are "employees" for the purposes of the *Labour Relations Act*, by virtue of the provisions of section 1(3)(b) of the Act. In this regard, the Hospital's position in paragraph (c) is in fact significant. For the onus upon a party seeking to alter the *status quo* after a position has for a number of years been accepted by the parties as either being inside or outside the unit, see *Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121; *Niagara College of Applied Arts & Technology*, [1981] OLRB Rep. July 939; and *Sudbury & District Health Unit* (unreported), Board File No. 2055-79-M, dated March 11, 1981.

5. The Board appoints an officer to inquire into and report to the Board on the duties and responsibilities of the persons occupying the positions of Senior Co-ordinator and Co-ordinator.

**File No. 2292-80-U Suzanne Hebert-Vaillant, Complainant, v.
Canadian Union of Public Employees Local 2327, Respondent**

Damages – Duty of Fair Representation – Practice and Procedure – Board finding breach of duty of fair representation – Parties not agreeing on quantum of compensation – National union not party to proceedings or initial Board order – Whether proper to issue compensation order against national union – Board finding only part of legal fees incurred compensable

BEFORE: Ian Springate, Vice-Chairman.

APPEARANCES: *John West for the complainant; Mario Hiki and Steve Backs for the respondent.*

DECISION OF THE BOARD; March 1, 1982

1. This matter arises out of a complaint under section 79 (now section 89) of the *Labour Relations Act* in which the complainant, Mrs. Hebert-Vaillant, alleged that she had been dealt with by the respondent, Canadian Union of Public Employees Local 2327 ("Local 2327") contrary to the provisions of section 60 (now section 68) of the Act. Section 68 provides that a trade union shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of employees.

2. Prior to the events giving rise to these proceedings Mrs. Hebert-Vaillant was employed as an attendance counsellor by the Prescott and Russell County Roman Catholic

Separate School Board. While so employed she made contact with the Canadian Union of Public Employees ("CUPE") and subsequently was the prime mover in an organizing campaign amongst the school board's employees. On November 13, 1979 the Board certified CUPE as the bargaining agent for a unit of the school board's employees. CUPE then chartered Local 2327, and Mrs. Hebert-Vaillant was elected president of the Local. During negotiations for a first collective agreement Mrs. Hebert-Vaillant led the employees out on a brief strike. She also put forward the union's position to the local press. On November 10, 1980 the employees rejected an offer of settlement put forward by the school board. On November 19, 1980, the school board announced that it was abolishing Mrs. Hebert-Vaillant's position. Mrs. Hebert-Vaillant subsequently requested of Mr. S. Backs, a CUPE national representative, that a section 89 complaint be filed with the Board alleging that her position had been abolished due to her activities on behalf of the trade union. This request was rejected by Mr. Backs. In a decision dated June 5, 1981 the Board determined that in turning down Mrs. Hebert-Vaillant's request, Mr. Backs had not put his mind to the various considerations relevant to deciding whether or not a section 89 complaint should be filed, and that his consideration of the matter had been so superficial and so perfunctory as to amount to conduct which was arbitrary and hence a violation of section 68. The Board also concluded that Mr. Backs was at the relevant time acting on behalf of Local 2327, and that accordingly his actions must be deemed to be the actions of the local, which was the only named respondent in the proceedings.

3. Mrs. Hebert-Vaillant eventually retained a firm of solicitors to assist her in filing her own section 89 complaint against the school board. A three man panel of the Board which heard the complaint unanimously ruled that the school board's termination of Mrs. Hebert-Vaillant had been in contravention of section 66 of the Act, which provides that an employer shall not discharge a person because that person is a member of a trade union or is exercising any other rights under the Act. The Board directed that the school board reinstate Mrs. Hebert-Vaillant with compensation for all lost wages and benefits. In the instant proceedings, the Board sought to remedy Local 2327's breach of section 68 by making the following direction:

"The respondent (Local 2327) is directed to compensate Mrs. Hebert-Vaillant for her reasonable costs associated with filing and pursuing her complaint against the School Board. The Board will remain seized of the matter in the event the parties are unable to agree upon the amount of compensation involved." (See [1981] OLRB Rep. June 623 for full decision)

The parties were unable to agree upon the amount of compensation involved, and accordingly the matter was relisted for hearing.

4. At the hearing held with respect to the amount of compensation owing, Mrs. Hebert-Vaillant's counsel for the first time asked that the CUPE national office, rather than Local 2327, be required to compensate Mrs. Hebert-Vaillant. In support of this request counsel noted that Local 2327 is a relatively new local with only some 23 members, and hence will likely have difficulty in compensating Mrs. Hebert-Vaillant.

5. As indicated above, the Board initially certified CUPE as the bargaining agent of the school board's employees. However, on December 4, 1980 a collective agreement was

entered into between the school board and Local 2327. The action of the local is signing the collective agreement presumably reflected a transfer of jurisdiction from CUPE to Local 2327 as well as a recognition of this transfer on the part of the school board. Mrs. Hebert-Vaillant was advised prior to the signing of the collective agreement that her position was being abolished. However, she did not cease working for the school board until January 1, 1981, by which time the collective agreement had been entered into. Against this background, a reasonable approach may well have been to name both CUPE and Local 2327 as respondents in the section 68 complaint. As it was, however, only Local 2327 was named as a respondent, and accordingly the Board made a direction only against the local.

6. The Board has long recognized that union locals are entities separate and apart from their parent national or international unions. See: *Macdonalds Consolidated Limited*, [1969] OLRB Rep. Aug. 634. This distinction has also been recognized by boards of arbitration. See: *Re Dryden Paper Co. Ltd., and Paperworkers' Union, Locals 105 and 1323* (1976) 11 L.A.C. (2d) 337 (Brown). In these circumstances, and given that CUPE was neither named as a respondent in these proceedings nor given any advance notice that an order to pay might go against it, I am satisfied that it would not be legally proper for a direction to pay to now go against CUPE.

7. Having reached the above conclusion, however, I feel constrained to make some additional comments on the matter. Quite apart from the fact that the bargaining rights were initially granted to CUPE, throughout the events giving rise to these proceedings the person with whom Mrs. Hebert-Vaillant dealt was Mr. Backs, a national representative of CUPE. The Board summarized Mr. Back's role in its decision of June 5, 1981 as follows:

"Mr. Backs is a national representative for CUPE, and has no official position with Local 2327 which is the named respondent in this matter. Mr. Backs was, however, involved in the organization of the School Board's employees and indeed it was he who signed CUPE's application for certification. Mr. Backs was actively involved in the negotiations for a collective agreement. When Mrs. Hebert-Vaillant was advised of her impending termination CUPE was still the legal bargaining agent for the School Board's employees. Mr. Backs remained involved with the affairs of Local 2327 after the collective agreement was signed and the bargaining rights transferred to Local 2327. When Mrs. Hebert-Vaillant approached Mr. Backs about the possibility of filing a section 79 complaint, Mr. Backs did not indicate that he was not the individual Mrs. Hebert-Vaillant should be dealing with or that she should discuss the matter with someone in the Local. Indeed since this was a new local comprised of newly-organized employees, it is doubtful if Mrs. Hebert-Vaillant could have meaningfully discussed her situation with anyone but Mr. Backs. Local 2327 was represented in these proceedings by Mr. Backs and a senior official of CUPE. At the hearing it was not contended that in dealing with Mrs. Hebert-Vaillant about a possible section 79 complaint, Mr. Backs was not acting on behalf of Local 2327. In all these circumstances I am satisfied that at the relevant time Mr. Backs was acting on behalf of the Local and that accordingly his actions must be deemed to be the actions of the respondent Local."

It should also be noted that at the hearing into the merits of the section 68 complaint, Local

2327 was represented by Mr. Backs and Mr. M. Hikl, CUPE's Legislative Director. One would presume that in representing the local, these gentlemen raised all the defences and relevant considerations going to the merits of the complaint, (apart, of course, from the issue of CUPE's liability) which they would have raised if CUPE had also been named as a respondent. In light of all these considerations, it appears to me that quite apart from the legal niceties of the issue, CUPE does have at least a moral obligation to assist Local 2327 in paying the compensation owing to Mrs. Hebert-Vaillant.

8. I turn now to the matter of the actual amount of compensation which is payable by Local 2327 to Mrs. Hebert-Vaillant. Mrs. Hebert-Vaillant's solicitors delivered to her an account for the section 89 complaint which totalled \$12,225.32. Of this amount, \$325.32 was for disbursements and \$11,900.00 for legal fees. Local 2327 does not dispute the amount for disbursements. The local does, however, contend that the amount for legal fees is unreasonably high, and that therefore it should not be required to compensate Mrs. Hebert-Vaillant for the full amount.

9. In reaching a determination in this matter, I would note that I have no jurisdiction to inquire into, or to reach any conclusions with respect to, the reasonableness of the account rendered to Mrs. Hebert-Vaillant by her solicitors within the context of their particular solicitor-client relationship. Whatever arrangements Mrs. Hebert-Vaillant may have reached with her solicitors, and the nature of her instructions to them, are not matters that were put before me, and properly so. My sole concern is with the amount that Local 2327 can reasonably be required to compensate Mrs. Hebert-Vaillant as a result of the union's breach of section 68. The amount, in my view, should not be any higher than what solicitors with experience in labour relations matters might normally charge for a section 89 complaint involving an alleged discharge for union activity, subject to adjustments for any special or unusual considerations.

10. On the material before me, I am satisfied that the section 89 complaint filed on behalf of Mrs. Hebert-Vaillant against the school board did not involve any issues of great complexity or difficulty. Because of the effect of what is now section 89(5) of the Act, throughout the proceedings the legal onus was on the school board to demonstrate that its decision to terminate Mrs. Hebert-Vaillant had not been motivated by her activities on behalf of the trade union. Although this was doubtlessly a case of great importance to Mrs. Hebert-Vaillant, there appears to have been nothing to set this case apart from the hundreds of similar cases which are heard by the Board every year. Accordingly, I am of the view that the subject matter and complexity of the case did not justify a legal fee higher than what one would normally expect.

11. The hearing before the Board on the section 89 complaint lasted three days. Mrs. Hebert-Vaillant was represented at the hearing by two experienced solicitors. It was contended before me that two solicitors were required due to the number of witnesses and documents involved as well as the general volume of the evidence. In all, both sides called a total of eight witnesses, while twenty-four documents were entered as exhibits. I am satisfied that there was nothing particularly out of the ordinary with respect to the amount of evidence or the number of witnesses and documents such as would have required the attendance of two experienced solicitors. While Mrs. Hebert-Vaillant may have taken some comfort in being represented by two experienced solicitors, in my view the extra costs involved should not be required to be borne by Local 2327.

12. There are in my view certain factors which do justify increasing the compensation in this matter. Firstly, Mrs. Hebert-Vaillant's solicitors spent some time in communicating with officials of CUPE in an attempt to have the union take over carriage of the section 89 complaint. In the particular circumstances of this case, I regard that as reasonable activity in connection with the complaint. Of more importance, however, is the fact that Mrs. Hebert-Vaillant's solicitors were required to spend more time doing "leg work" and investigations than would normally be the case on a section 89 complaint. Generally section 89 complaints arising out of alleged unlawful discharges are filed by trade unions. A solicitor acting on behalf of such a trade union will almost invariably be briefed by an experienced union representative who has already done his own initial investigation of the matter, and accordingly can advise the solicitor of the background to the complaint, and what he has been told during the course of his investigation. The union representative can also give his impressions concerning which individuals are likely to be cooperative witnesses, and what position the employer is likely to take. Mrs. Hebert-Vaillant's solicitors did not have the benefit of this type of briefing from an experienced union representative, and accordingly, it stands to reason that their investigation and preparation time would have been somewhat greater than otherwise would have been the case.

13. Another relevant consideration arises out of the school board's initial response to the Board's direction that it reinstate Mrs. Hebert-Vaillant. The school board reinstated Mrs. Hebert-Vaillant but did not assign her any work. Mrs. Hebert-Vaillant's solicitors discussed the issue with counsel for the school board, and eventually resolved the matter to Mrs. Hebert-Vaillant's satisfaction. Mrs. Hebert-Vaillant's solicitors were also involved in settling the actual amount of compensation payable to Mrs. Hebert-Vaillant.

14. In my view, the various factors set out above justify a requirement that Local 2327 compensate Mrs. Hebert-Vaillant for legal expenses somewhat greater than one would expect in most section 89 complaints. However, in my opinion they do not justify the Local being required to compensate Mrs. Hebert-Vaillant for a legal fee of \$11,900.00. Indeed, in my view the most the Local can reasonably be required to compensate Mrs. Hebert-Vaillant for legal fees as a result of its breach of section 68 is as follows. For all work prior to final preparation for the hearing, including meetings with Mrs. Hebert-Vaillant, investigating the facts, discussions with CUPE representatives, preparation of the complaint, and discussions with a Board Officer about a possible settlement: \$1,100.00. For preparing for, and attending at the hearing before the Board: \$3,000.00. For all work subsequent to the release of the Board's decision, including finalizing the amount of compensation payable to Mrs. Hebert-Vaillant, and resolving the dispute about her work assignment: \$400.00. The total involved is \$4,500.00. Accordingly, Local 2327 is directed to compensate Mrs. Hebert-Vaillant for legal fees of \$4,500.00 plus \$325.32 in disbursements, for a total of \$4,825.32.

2381-81-R International Union of Allied Novelty and Production Workers, Local 905, Applicant, v. Central Hospital, Respondent

Pre-Hearing Vote – Practice and Procedure – Respondent challenging union's status to obtain bargaining rights in the health care sector – Whether issue must be resolved prior to direction of pre-hearing vote

BEFORE: R. D. Howe, Vice-Chairman, and Board Members W. H. Wightman and O. Hodges.

DECISION OF THE BOARD; March 8, 1982

1. This is an application for certification.
2. The applicant has requested that a pre-hearing representation vote be taken.
3. The respondent has filed with the Board a Form 10 Reply to this application in which it states (in paragraph 10):

“The respondent submits that the applicant is a trade union without status to represent employees in an office and clerical bargaining unit in a hospital in the health care field in Ontario and the application should therefore be dismissed. It is noted that the instant application was filed with the Board on February 17, 1982. The respondent wishes to point out that it was informed by the Board on February 18, 1982 that the applicant had withdrawn its Application for Certification previously filed in respect of employees of the respondent affected by this application (Board file number 2283-81-R). The respondent submits, in the circumstance, that the instant application constitutes an abuse of the Board's process under the governing legislation and should, accordingly, not be entertained. The respondent further submits that having regard to the foregoing considerations a pre-hearing representation vote ought not to be directed and the respondent requests that a hearing of the Board be held to deal with the issues raised above and such other representations as may be made on its behalf.”

4. In *Emery Industries Limited*, [1980] OLRB Rep. March 316, the Board described the purpose of a pre-hearing vote as follows:

“It is axiomatic that in labour relations matters ‘time is of the essence’; but that is especially the case in respect of representation votes. If the trade union's certification application, and its status as bargaining agent, are not resolved expeditiously (i.e., if it cannot engage in collective bargaining, or perform the other representational functions for which it was selected) there may be discontent among its supporters and a possible erosion of that support. This might not only make the union's certification more difficult, but could also complicate its collective bargaining task. The purpose of the pre-hearing, or ‘quick vote’ procedure is to facilitate a prompt resolution of representation questions,

by permitting the Board to test employee wishes as soon as possible following the application date. This avoids the potential prejudice which might arise if a representation vote had to await a decision following a formal certification hearing. Some delay is inevitable, but the pre-hearing vote procedure is a legislative attempt to remove some of the problems, and prejudice, associated with delay while, at the same time, ensuring that all of the parties will be given a full opportunity to make their submissions with respect to any matters in dispute."

(See also *Harding Carpets Limited, Collingwood, Ontario*, [1978] OLRB Rep. Jan. 46; and *Sayvette Family Department Store Ltd.*, [1974] OLRB Rep. May 327).

5. The Board has a discretion under section 9 of the *Labour Relations Act* to direct that a pre-hearing representation vote be taken where an applicant trade union requests that such vote be taken (and the other requirements of that section have been satisfied). Thus, if the Board is of the view that the issues raised in an application under section 9 are of such nature or complexity that a pre-hearing representation vote would not be appropriate, the Board has a discretion to refuse the request for such vote. (See, for example, *Howard Furnace Limited*, [1961] OLRB Rep. July 98, in which the Board denied a request for a pre-hearing representation vote on the basis of "the complexity of the issues involved with respect to the composition of the bargaining unit".)

6. The Board's jurisprudence clearly indicates that an applicant is not precluded from utilizing the pre-hearing vote procedure prior to establishing its status as a trade union (see *Groves Park Lodge*, [1981] OLRB Rep. Nov. 1581, and *Emery Industries Limited*, *supra*). The Board has previously found the present applicant to be a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* (see *Regal, Division of General Mills, Ltd.*, Board File No. 1384-79-R, decision dated November 9, 1979, unreported). By virtue of section 105 of the Act, that finding is *prima facie* evidence in these proceedings that the applicant is a trade union for the purposes of the *Labour Relations Act*. Having regard to the desirability that the pre-hearing vote procedure be available whenever practicable as an expedited means of application whereby the wishes of the employees may be determined at the earliest possible date, and having regard to the approach that the Board has generally adopted in pre-hearing vote applications in which the applicant's "status" is in issue, the Board is of the view that the issue of whether the applicant is "without status to represent employees in an office and clerical bargaining unit in a hospital in the health care field in Ontario" as alleged by the respondent, may properly be determined after a pre-hearing representation vote has been taken in this matter.

7. As noted in the respondent's Reply, this application was filed on February 17, 1982 at a time when a final decision had not yet been issued by the Board with respect to a previous certification application filed with the Board by the applicant (Board File No. 2283-81-R). By decision dated February 18, 1982, the Board, differently constituted, issued the following final decision with respect to that application:

"Application withdrawn by leave of the Board."

8. Section 103(3) of the Act provides:

"Notwithstanding sections 5 and 57, where an application has been made

for certification of a trade union as bargaining agent for employees in a bargaining unit or for a declaration that the trade union no longer represents the employees in a bargaining unit and a final decision of the application for such certification or for such a declaration is made with respect to any of the employees affected by the original application, the Board may,

- (a) treat the subsequent application as having been made on the date of the making of the original application;
- (b) postpone consideration of the subsequent application until a final decision has been issued on the original application and thereafter consider the subsequent application but subject to any final decision issued by the Board on the original application; or
- (c) refuse to entertain the subsequent application."

Pursuant to section 103(3)(b), the Board postponed consideration of the present application until the final decision had been issued on the original application on February 18, 1982, and thereafter proceeded to consider the present application. It is, of course, nevertheless open to the respondent to contend at the hearing which will be held after the taking of the pre-hearing representation vote in this matter, that the Board should refuse to entertain this application.

9. The sealing of the ballot box pending the final determination by the Board of the issues raised by the respondent in its Reply will ensure that the respondent's position with respect to those issues is not prejudiced by the taking of the pre-hearing representation vote. If the Board were to direct a hearing in order to resolve those issues prior to recording the support enjoyed by the applicant in a representation vote, and the Board subsequently determined that a representation vote should be held, the applicant's position could be substantially prejudiced by the delay.

10. It appears to the Board on an examination of the records of the applicant and the records of the respondent that not less than thirty-five per cent of the employees of respondent in the voting constituency hereinafter described were members of the applicant at the time the application was made.

11. Having regard to the agreement of the parties, the Board directs that a pre-hearing representation vote be taken of the employees of the respondent in the following voting constituency:

"All office and clerical employees of the respondent at its hospital in Metropolitan Toronto save and except Supervisors, persons above the rank of Supervisor, Administrative Assistants to the Executive Director, the Administrator, the Assistant Administrators and the Personnel Director, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation periods."

12. All employees of the respondent in the voting constituency on the 2nd day of

March, 1982, who have not voluntarily terminated their employment or who have not been discharged for cause between the 2nd day of March, 1982, and the date the vote is taken will be eligible to vote.

13. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

14. The Board directs that the ballot box containing all the ballots cast in the pre-hearing representation vote be sealed and that the ballots not be counted pending further direction by the Board, unless the parties hereto agree that the ballots should be counted.

15. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER OLIVER HODGES;

1. The applicant in this case has previously established status as a trade union before the Ontario Labour Relations Board as noted in paragraph 6 of this unanimous decision. My dissenting decision in *Groves Park Lodge*, [1981] OLRB Rep. November 1981, does not therefore impugn the present applicant.

0197-81-U Stanley Dwyer, Applicant, v. United Automobile Aerospace & Agricultural Implement Workers of America U.A.W. — International Union, United Automobile, Aerospace & Agricultural Implement Workers of America U.A.W. Local 1285, Respondent, v. Chrysler Canada Limited, Intervener

Evidence – Practice and Procedure – Witness – Existence or relevance of document uncertain – Document not subpoenaed – Whether Board directing production

BEFORE: R. O. MacDowell, Vice-Chairman.

APPEARANCES: *E.G. Posen for the applicant; E.D. Bruce, B.E. Hargrove and L.A. MacLean for the respondent; M.D. Contini and C. Gyles for the intervener.*

DECISION OF THE BOARD; March 12, 1981

1. This is a complaint under section 89 of the *Labour Relations Act* alleging a breach of section 60 (now 68) of the Act.

2. In 1976, the complainant's employment was terminated. A grievance was filed on Mr. Dwyer's behalf and processed to arbitration. The arbitrator upheld the termination. One of the issues raised in this complaint is the quality of union representation which Mr. Dwyer received in the preparation and presentation of his arbitration case.

3. The current complaint was filed on April 24, 1981, some years after the incidents

which the complainant now contends involve a breach of section 68. The union was aware of the complainant's dissatisfaction with the arbitrator's award and of some of the steps which he has taken to rectify the situation. However, it was not until relatively recently that the complainant's concern — originally based upon an allegation that he had been unjustly discharged by his employer — was transformed into a concrete complaint against his union alleging that he had not been properly represented.

4. This proceedings has been ongoing before the Board for some days. The Board has already heard extensive evidence from the complainant himself, and from Buz Hargrove, the trade union official who represented Mr. Dwyer at the arbitration hearing. Both the complainant and Mr. Hargrove testified at some length about what occurred before and during that hearing. The Board has scheduled several more days to hear the evidence of other union witnesses concerning this, and other aspects of the complainant's allegations.

5. Mr. Hargrove was called as a witness by the union. He was not subpoenaed by the complainant. During his cross-examination, Mr. Hargrove made reference to some notes which he had made some years before in preparation for the complainant's arbitration case. Counsel for the complainant requests that the Board direct that those notes be produced.

6. Mr. Hargrove testified that he does not have the notes in question. After the commencement of these proceedings, he searched his office for them without success. However, several hundred boxes of documentary material concerning the union have been sent to the Canadian Archives in Ottawa, and Hargrove told the Board that the notes might be in this material. Hargrove had already requested that a search be undertaken in the file boxes and under the headings where the notes were most likely to be found; but, again, this search proved fruitless. The notes may have been destroyed or lost, or they may be buried somewhere in the mountain of material currently in the possession of the Federal Archives. And, of course, even if the notes could be found within a reasonable period of time, there may be nothing in them which would be material or which would assist the Board in making its determination. Counsel for the union observes that had the complainant filed his complaint within a reasonable time after the occurrence of the conduct about which he now complains, this problem probably would not have arisen. Counsel argues that it would be oppressive to direct the respondent, at this late date, to send several persons to Ottawa to sift through hundreds of boxes of documents (for this is what it would require) because of a *possibility* that Hargrove's notes *might* be found and that they *might* be relevant.

7. The respondent has already voluntarily produced a number of documents which it had in its possession and which might be relevant to the matters here in dispute. There is no evidence or allegation that documents have been suppressed. In the Board's view, it would be unreasonable to direct further production of material which was never subpoenaed, may not now even exist, and which if it does exist and can be found, may neither contradict nor supplement the viva voce evidence which the Board has already heard concerning the events in issue. Accordingly, the complainant's motion is dismissed.

2073-81-R United Food and Commercial Workers International Union, A.F.L., C.I.O., C.L.C., Applicant, v. **C S P Foods Ltd.**, Respondent, v. Group of Employees, Objectors

Certification – Change of Working Conditions – Petition – Unfair Labour Practice – Whether announcement of benefits at employee-management committee meeting contravening statutory freeze – Whether tainting otherwise voluntary petition

BEFORE: Ian Springate, Vice-Chairman, and Board Members J.D. Bell and C.A. Ballentine.

***APPEARANCES:** James Hayes, David Bloom and Vincent Gentile for the applicant; R. W. Kitchen and Charles Cyopik for the respondent; James W. Hammond, Q.C. for the group of employees.*

DECISION OF IAN SPRINGATE, VICE-CHAIRMAN, AND BOARD MEMBER J. D. BELL; March 22, 1982

1. This is an application for certification.

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3. We find that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

4. Having regard to the agreement of the parties, we further find that all employees of the respondent in the township municipality of the Township of Flamborough, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period constitute a unit of employees of the respondent appropriate for collective bargaining.

5. On the date of the filing of the application there were forty-three employees in the bargaining unit. The applicant trade union filed evidence of membership on behalf of twenty-four, or approximately 55.8 per cent of these employees. In these circumstances we are satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on January 11, 1982, the terminal date fixed for this application and the date which we determine, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. The applicant has accordingly met the minimum statutory requirements for automatic certification.

6. There was filed a statement of desire in opposition to the application signed by twenty-nine employees in the bargaining unit, eight of whom had previously applied to become members of the applicant trade union. Having regard to the applicant's membership position, if we were satisfied that the union members who signed the statement of desire did so as a result of a voluntary "change of heart" about trade union representation, then in accordance with the Board's normal practice we would exercise our discretion under section 7(2) of the Act and direct the taking of a representation vote.

7. Before the Board will direct the taking of a representation vote on the basis of a statement of desire, it must be satisfied that management played no role in either its origination or circulation and further that the union members who signed the document did not do so as result of either real or perceived management pressure or out of a concern that failure to sign the document might be communicated to their employer.

8. The evidence establishes that the decision to circulate a statement of desire was made by a small group of employees free from any managerial involvement. One of the employees, Mr. Alex Onufer, approached his personal solicitor for assistance in the matter, but his solicitor referred him to another lawyer. This other lawyer then referred Mr. Onufer to Mr. J. Hammond, Q.C. who actually drafted the statement of desire and gave Mr. Onufer instructions concerning the manner in which the document should be circulated.

9. The statement of desire was circulated by bargaining unit employees away from the respondent's premises. Most employees signed the document in their own homes, although a few signed at the home of friends, and two signed in an automobile. A system of "blindlers" was used to cover up the signature of each employee after he had signed the statement. Given these facts, we are satisfied that there is nothing with respect to either the origination or circulation of the statement of desire which would cause us not to accept the document as a voluntary expression of those who signed it.

10. Counsel for the applicant trade union contended that the Board should not give any weight to the statement of desire due to certain events which occurred prior to the document's circulation. One of these was a meeting of an employee-management committee on January 6, 1982, the day after the respondent was formally advised of the application for certification and the day prior to when the statement of desire began to be circulated. The employee-management committee had originally been formed in late July or early August of 1981, and since that time had held meetings about once a month, although no meeting was held during the month of December, 1981. The committee was formed at the initiative of management to deal with certain employee concerns and as an extension of the respondent's "open door" personnel policy. From its very inception employee members of the committee had raised concerns about the lack of written company policies on a wide range of issues, and the fact that employees in the same situation appeared to be treated differently. As a result of these concerns management began to put various policies into writing. In some cases this involved merely putting into writing an existing unwritten policy while in other cases it involved setting a uniform policy where previously a number of different practices had been followed. Once a policy was put into writing, management would so advise the employee members of the committee with the expectation that they would pass the information on to other employees. At a meeting of the committee on September 23, 1981, management announced that the policies which had to date been put into writing had been placed in a policy manual which the employee members of the committee were free to examine.

11. It was the contention of the applicant that at the committee meeting held on January 6, 1982, the respondent announced a number of improvements in working conditions. Counsel contended that alleged improvements amounted to a violation of section 79(2) of the statute (which imposes a "freeze" on terms and conditions of employment after an employer has been notified of an application for certification), and that they would have unduly influenced employees into signing the statement of desire. The evidence establishes that all of the issues dealt with by management at the January 6th meeting had been raised by

employees at earlier meetings, and that management had actually put the policies referred to during the January 6th meeting into writing some time prior to that date. The evidence also establishes that the January 6th meeting followed the same general format as had previous meetings of the committee.

12. Certain of the written company policies discussed on January 6, 1982, did not involve any change from a previous unwritten policy. Included in this category were a policy to compensate employees called for jury duty, and a policy respecting the payment of employees for scheduled call-ins. Another written policy announced on January 6th dealt with the qualifications for short term disability payments. It is clear that under a prior unwritten policy an employee would have to wait for three days before receiving disability payments unless he had either been injured or was hospitalized, in which case there was no waiting period. What was previously unclear, and apparently there had been some inconsistency on this point, was whether an employee who brought in a note from a doctor would also be paid from the first day. The written policy announced on January 6th provided that the three day waiting period would not apply to an employee who had been injured or was hospitalized or to an employee who presented a doctor's note stating that he will be off for a given period of time. Also announced on January 6th was a written policy stating that employees recalled to work on an emergency basis would be paid the applicable hourly rate (with a one hour minimum) as well as a special allowance of \$20.00. Previously, this type of call-in had been paid for in a variety of ways, including time only, time with a minimum of one hour, time with a minimum of three hours, and \$15.00 plus time. Both the policy concerned with disability payments and the policy relating to emergency call-in allowances had actually been put into writing on December 3, 1981 albeit they were not announced by management until the next committee meeting on January 6th.

13. We are of the view that in certain instances benefits granted by an employer during a union organizing campaign may well have an undue influence on the decision of employees to sign a statement of desire. The danger inherent in well-timed increases in benefits is the suggestion of "a first inside a velvet glove." Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged. See: *NLRB v. Exchange Parts Co.* (1964), 375 U.S. 405 (U.S. Sup. Ct.) and *The Globe and Mail Division of Canadian Newspapers Company Limited*, [1982] OLRB Rep. Feb. 189. In the instant case, however, we are satisfied that the facts do not warrant a conclusion that employees may have signed the statement of desire as a result of being influenced by management's announcement of the written policies at the January 6th committee meeting. Management's actions in putting into writing and standardizing personnel policies, and then announcing the results at a committee meeting, was an on-going process which preceded the applicant's organizing campaign. The issues discussed on January 6th had all been raised at earlier meetings by employees. Accordingly, employees would not likely have regarded the announcement of the written policies on January 6th as a management response to the union. Further, the written policies announced on January 6th by and large involved little change from previous unwritten policies. To the extent that they did involve some standardization and improvement to the system of payments for emergency call-ins and the qualifying period for disability payments, we do not regard the changes as being of such a nature that they would likely have influenced employees one way or the other with respect to the statement of desire. As already noted, counsel for the applicant contended that the respondent in announcing the new written policies at the January 6th meeting was in violation of section 79(2) of the Act. In this regard, we would note that the issue before us at

this time is not whether the respondent violated the Act, but whether the respondent's actions may have influenced employees into signing the statement of desire. We are satisfied that they did not.

14. The other issue relied upon by the applicant relates to a comment made by Mr. Leonard Ord, one of the respondent's foremen, to a warehouse employee, Mr. D. Hardy on December 30, 1981. On the day in question, Mr. Ord, Mr. Hardy and two other employees were alone in the respondent's warehouse. In the presence of the other two employees, Mr. Ord told Mr. Hardy that if the union was to come in there would probably be lay-offs and since Mr. Hardy was a new employee he likely would be "bumped" by employees from the plant. Of the three employees who heard Mr. Ord's comment, two had not signed union cards. The other employee had signed a union card and did not subsequently sign the statement of desire. Accordingly, none of those who heard Mr. Ord's comments were among the eight union members who apparently had a change of heart about union representation. Indeed, the one union member who did hear the comment remained a union supporter. There is no evidence before us to indicate that Mr. Ord's comment was reflective of the comments of other foremen or of the respondent's senior management or that Mr. Ord's comment was ever made known to the workforce at large. In these circumstances, we are not prepared to assume that Mr. Ord's comment influenced the decision of any of the union members who signed the statement of desire.

15. Having regard to the above, we are satisfied that the statement of desire reflects a voluntary change of heart on the part of the union members who signed it, and that accordingly, absent consideration of the matters referred to below, we should exercise our discretion under section 7(2) of the Act and direct the taking of a representing vote.

16. Both in its filings and at the hearing the applicant indicated that it might seek to be certified pursuant to the provisions of section 8 of the *Labour Relations Act*. If that is the applicant's desire, the Registrar is to relist this matter for hearing to hear the evidence and the representations of the parties with respect to both the section 8 application, and a related section 89 complaint in Board File No. 2178-81-U. If the applicant advises the Registrar that it does not wish to proceed under section 8, then a representation vote will be taken among employees in the bargaining unit. Those eligible to vote will be all employees in the bargaining unit on the date hereof who have not voluntarily terminated their employment or been discharged for cause between the date hereof and the date the vote is taken. Voters will be asked to indicate whether or not they desire to be represented by the applicant in their employment relations with the respondent.

17. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER C. A. BALLENTINE;

1. I disagree with the majority that the "statement of desire" is a voluntary expression of the bargaining unit employees who signed it.

2. I agree with counsel for the applicant union that the employees' committee meeting called by the general manager, Mr. Charles Cyopik, on January 6, 1982, would have unduly influenced employees into signing the petition against the union.

3. Mr. Cyopik returned from vacation on January 4, 1982, at which time he was told by his office staff of the union organizing campaign. On January 5, 1982 he received from the Board the application for certification and then immediately called a meeting for the next day January 6, 1982. The following day after the meeting, Mr. Alex Onufer a truck driver employee who attended the meeting started circulating the petition.

4. Two witnesses for the applicant union, Mr. James Burns and Mr. Robert Beke, both committee members who attended the meeting, gave evidence that two conditions, (1) jury duty and (2) call-in time, had been discussed before but were put into writing for the first time at the January 6th meeting. Their evidence was clear that the sick benefit condition of reducing the waiting period from three days to one day was a new policy and condition. Robert Beke had raised the sick benefit issue at the September meeting, but the November meeting minutes make no mention of it. Alex Onufer also admitted under cross-examination that the reduction of the three days in regard to the sick benefit was a new condition.

5. The employees, prior to January 6, 1982, were never given a policy statement on the changes. The company relied on the committee members to report back to the employees and the supervisors had policy manuals if an employee asked them for any information. It is obvious that the employees were not well informed of which policies were in place and of which were not. Mr. Rodrick Johnson, a truck driver and a three year employee who assisted Mr. Onufer in the circulation of the petition, stated under cross-examination that Mr. Onufer had told him of the January 6th meeting, but he never heard of the employees' committee before.

6. Mr. Cyopik, by confirming previous policies in writing and announcing the new sick benefit condition at the January 6th meeting, one day after the company received the application for certification from the Ontario Labour Relations Board, amounts to a violation of section 79(2) of the Act and was intended to influence the employees to oppose the union's application for certification. Section 79(2) of the Act prohibits the employer from making changes to wages and conditions after notice of an application for certification has been given by the Board. Section 79(2) reads as follows:

“Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

- (a) the trade union has given notice under section 14, in which case subsection (1) applies; or
- (b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.”

7. In a case that closely parallels this instant case, *Carlton University* [1978] OLRB Rep. Feb. 184, the Board found that the respondent breached section 70(2) (now section 79(2)) and it stated at page 188, paragraph 16 the following:

“Having regard, therefore, to the thrust of the Board's jurisprudence and

the purpose of the section 70(2) freeze, the Board is of the view that for an employer to sidestep the parameters of the freeze period by setting into motion prior to the freeze period an alteration of conditions of employment to take effect after the onset of the freeze period, the employer must have communicated the intended alteration to the employees prior to the onset of the freeze period."

8. The majority decision at paragraph 14 deals with the issue where Mr. Leonard Ord, one of the respondent's foremen, told Mr. Hardy, a member of the bargaining unit, that if the union got in he would probably be laid off. The majority rationalizes this uncontradicted evidence on the grounds that Mr. Hardy did not sign the petition and therefore the incident is irrelevant. I cannot agree. It is a threat made by a person acting on behalf of the employer. The statement was obviously made with the intention of coercing the employee to oppose the union's application for certification which makes the statement improper and illegal.

9. It is my decision that the company interfered with the protected activity of the applicant union in a way that was illegal. This unlawful interference unduly influenced employees into signing the statement of desire. The applicant union filed evidence of membership on behalf of twenty-four (24) employees, representing over fifty-five (55) per cent, therefore, a certificate should issue to the applicant without the necessity of a representation vote.

**2245-81-M Ontario Sheet Metal Workers' Conference, Applicant,
v. Culliton Brothers Limited, Respondent**

Collective Agreement – Construction Industry – Construction Industry Grievance – Legislative amendments binding parties to province-wide ICI agreement – Parties unaware of effect of accreditation and province-bargaining legislation – Union not enforcing agreement for several years – Whether abandonment – Whether estoppel applies – Abandonment and estoppel no defence to public statute

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

APPEARANCES: *A. M. Minsky and R. Belleville for the applicant; G. Grossman, Keith Culliton and George Culliton for the respondent; David Davies, Brian Schade, Mike Young, George Warnock and John Brennan for a group of employees of the respondent's sheet metal division.*

DECISION OF THE BOARD; March 17, 1982

1. The applicant has referred a grievance concerning the interpretation application, administration or alleged violation of a collective agreement to the Board for final and binding determination.

2. The Ontario Sheet Metal and Air Handling Group (the "Group") was served with

notice of this referral and of hearing. The Group did not attend at the hearing. However, in a letter its counsel informed the Board that the Group endorsed the position of the applicant and submitted that the respondent is bound by the provincial collective agreement in effect between the Group and the applicant.

3. At the outset of the hearing it was agreed that the Board should determine the preliminary question concerning whether there is a collective agreement in effect and remain seized on the question of the amount of damages.

4. Keith Culliton joined R. T. McBride Plumbing and Heating ("McBride") as an employee on September 15, 1947. McBride was engaged in sheet metal work. In 1953, McBride was incorporated. On February 1, 1964, Mr. Culliton and another person purchased all of the shares in McBride, from Helen McBride, the widow of Mr. R.T. McBride. On February 1, 1968, an electric motor rewinding division was opened and on March 1, 1968, an electrical contracting division was opened. In 1976, the name of the company was changed to the name of the respondent. The respondent and its predecessor have performed work in the industrial, commercial and institutional sector of the construction industry since 1947. Over the last ten years about eighty per cent of its work has been in the industrial, commercial and institutional sector. The respondent has its place of business in the City of Stratford.

5. On February 18, 1972, the Mechanical Contractors Association of Ottawa ("MCAO") filed an application for accreditation with respect to the Sheet Metal Workers' International Association, Local Union 47 ("Local 47"). In a decision dated February 16, 1973, the Board accredited the MCAO as "the bargaining agent for all employers of sheet metal workers and sheet metal worker apprentices on whose behalf [Local 47] has bargaining rights in the following area, in the judicial District of Ottawa-Carleton and the United Counties of Prescott and Russell, the United Counties of Stormont, Dundas and Glengarry, the Counties of Grenville, Lanark and Renfrew and that part of the District of Nipissing south of a line from Mattawa on the Quebec border to the Northwest corner of Boyd Township, Southwest to the Northwest corner of Paxton Township in the industrial, commercial and institutional sector and residential sector". The certificate also recites a list of the employers for whom the MCAO became the bargaining agent under the certificate and concluded by stating "and such other employers for whose employees [Local 47] may after February 18, 1972, obtain bargaining rights through certification or voluntary recognition in the geographic area and sector [sic] set out in the unit of employers described herein". The name of the respondent does not appear on the list of employers set forth in either the certificate or the decision. Paragraph thirteen of the decision states:

13. Having regard to all the above findings a certificate of accreditation will issue to the applicant for the unit of employers found to be the appropriate unit of employers in paragraph 5 and in accordance with the provisions of section 115(2) [now section 127(2)] of the Act for such other employers for whose employees the respondent may after February 18, 1972, obtain bargaining rights through certification or voluntary recognition in the geographic area and sectors set out in the appropriate unit of employers.

(emphasis added)

6. In 1975 the respondent secured a contract with the City of Cornwall for the

performance of most of the mechanical (including the sheet metal work) and all of the electrical work on a civic hall and arena (the "project"). The work on this project commenced in August or September of 1975 and was substantially completed in January of 1977. The respondent employed six or seven persons on the sheet metal work portion of the contract. The respondent also used a local contractor from Cornwall as a subcontractor on the project.

7. In a decision dated August 24, 1976, the Board issued a certificate to Local 47 with respect to a bargaining unit of employees of the respondent. The certificate which was issued pursuant to the decision dated August 24, 1976, defines the bargaining unit as "all sheet metal workers and sheet metal apprentices in the employ of Culliton Brothers Limited in the United Counties of Stormont, Dundas and Glengarry, save and except non-working foremen and persons above the rank of non-working foreman". The geographic area included in the definition of the bargaining unit is within the geographic jurisdiction of Local 47 and is also within the geographic area set forth in the certificate of accreditation.

8. In a letter dated September 3, 1976, to the respondent, Local 47 served written notice of a desire to bargain for a collective agreement. Local 47 proposed that a meeting be held at a certain hotel in Cornwall and stated that it looked forward to an early reply so that a meeting could be established at an early date. The solicitors for the respondent replied in a letter dated September 10, 1976, and asked for proposals. The solicitors added that after reviewing the proposals Raymond Guertin, the business manager of Local 47, would be contacted and a mutually satisfactory meeting date would be arranged.

9. In a letter dated September 13, 1976, Mr. Guertin sent Local 47's proposals to the respondent's solicitors. The proposals were apparently an unsigned copy of the collective agreement between Local 47 and the MCAO which by its terms was effective from May 1, 1975, until April 30, 1977, and a sheet of paper in the following form:

COLLECTIVE AGREEMENT

Between

LOCAL UNION 47

of the

SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION

AND

THE MECHANICAL CONTRACTORS
ASSOCIATION OF OTTAWA
(SHEET METAL DIVISION)

Effective From May 1, 1975 to April 30, 1977

THE UNION — LOCAL UNION 47 SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION

AND

THE EMPLOYER — CULLITON BROTHERS LTD.,
Hereby agree to be bound by all provisions of this Collective Agreement.

Signed in the city of Ottawa, County of Carleton

this day of 19 .

FOR THE UNION

FOR THE EMPLOYER

WITNESS

10. The respondent and Local 47 did not meet and on September 29, 1976, Robert Belleville, the business representative of Local 47, completed a request for the appointment of a conciliation officer. In a letter dated October 14, 1976, the Deputy Minister of Labour advised the respondent and Local 47 that a conciliation officer had been appointed and further advised that the conciliation officer would convene a meeting at a certain hotel in Ottawa on October 29, 1976. Keith Culliton and a solicitor who was acting for the respondent met with the conciliation officer and representatives of Local 47 in Ottawa on October 29, 1976. The respondent adopted the position that it would not sign the collective agreement as presented by Local 47. In a letter dated November 2, 1976, the Deputy Minister of Labour advised the parties that the Minister of Labour had decided not to appoint a Board of Conciliation in reference to the dispute between them. Since January of 1977, Local 47 has not been aware of the respondent working within its geographic jurisdiction. Local 47 has never filed a grievance with the respondent under a collective agreement and no contact occurred between the respondent and Local 47 from October of 1977 until Mr. Belleville (who has succeeded Mr. Guertin as business manager of Local 47) sent a letter dated February 16, 1981, to the respondent which stated:

Further to our Certificate from the Ontario Labour Relations Board awarding us the bargaining rights for all Sheet Metal personnel in your employ.

In accordance with the provisions of the Ontario Labour Relations Act, we request that you accept this letter as a written notice of a desire to bargain for a Collective Agreement.

We look forward to your early reply so that a meeting be established at an early date.

Mr. Belleville informed the Board that his intention was to see if the respondent would state its position with respect to whether it was bound by a collective agreement for the industrial, commercial and institutional sector. The respondent did not respond to this letter.

11. Mr. Belleville, who is also the secretary-treasurer of the applicant, and other officers of the applicant have monitored the commercial activity of the respondent throughout

Ontario in a trade paper. With the coming into effect of *Bill 204* in May 1, 1980, the applicant has taken an increasing interest in the application of its provisions to the respondent. On the suggestion of Mr. Belleville, the applicant consulted its own solicitors and on January 14, 1982, its solicitors wrote the following letter to the respondent:

Dear Sirs,

- Re: Provincial Agreement between Ontario Sheet Metal and Air Handling Group with Sheet Metal Workers' International Association and Ontario Sheet Metal Workers' Conference for its affiliated local union effective from May 1st, 1980 until April 30th, 1982 ("the Provincial Agreement")
 - Re: Violations of said Provincial Agreement by Culliton Brothers Limited
-

We are solicitors for Ontario Sheet Metal Workers' Conference ("the Union") and are now retained with respect to the following matter.

By certificate dated August 24th, 1976, the Ontario Labour Relations Board certified Sheet Metal Workers' International Association, Local Union No. 47 ("Local 47") as bargaining agent of all sheet metal workers and sheet metal workers' apprentices in the employ of Culliton Brothers Limited ("Culliton") in the United Counties of Stormont, Dundas and Glengarry, save and except non-working foremen and persons above the rank of non-working foreman (O.L.R.B. File No: 0895-76-R).

On February 16th, 1973, the Board accredited the Mechanical Contractors' Association of Ottawa as the bargaining agent for all employers of sheet metal workers and sheet metal workers' apprentices on whose behalf Local 47 had bargaining rights in the Judicial District of Ottawa-Carleton and the United Counties of Prescott and Russel, the United Counties of Stormont, Dundas and Glengarry, the Counties of Grenville, Lanark and Renfrew and that part of the District of Nipissing south of a line from Mattawa on the Quebec border to the north-west corner of Boyd Township, south-west to the north-west corner of Paxton Township in the industrial, commercial and institutional sector and residential sector (O.L.R.B. File Nos: 1635-71-R). Accordingly, upon the certification of local 47, as aforesaid, by operation of the Labour Relations Act, Culliton became bound to the then existing collective agreement between the accredited Association and Local 47 and, thereafter, the successive collective agreement between those parties which was effective from May 1st, 1977 until April 30th, 1978.

As a result of designation orders issued by the Minister of Labour in 1978, the Ontario Sheet Metal and Air Handling Group entered into a Provincial Agreement with the Sheet Metal Workers' International Association and the Union herein for the period May 1st, 1978 until April 30th, 1980 and thereafter, entered into the current Provincial Agreement effective from May 1st, 1980 until April 30th, 1982. By operation of the Labour

Relations Act, Culliton was, therefore, bound by the initial such Provincial Agreement and has been and remains bound by the current Provincial Agreement between the aforementioned bargaining agencies.

We herewith give notice to you on behalf of our client and its affiliated bargaining agents that you are required to adhere to and apply all of the terms and conditions of the Provincial Agreement in respect to your employment of sheet metal workers and their apprentices at your projects in Ontario, including the projects at which our client is now aware, namely, Richmond Place, London, Ontario and the Hamilton General Hospital, Hamilton, Ontario. We wish to inform you that in the event of your failure to forthwith honor all of the terms and conditions of the Provincial Agreement, a copy of which is enclosed herewith, we have been instructed to commence grievance/arbitration proceedings as against Culliton pursuant to Section 124 of the Labour Relations Act to enforce the rights of our client and its affiliated local unions in this matter.

There was no response to this letter and on January 25, 1982, the solicitors for the applicant wrote the following letter to the respondent and the Group:

Dears Sirs,

Re: Provincial Agreement between Ontario Sheet Metal and Air Handling Group with Sheet Metal Workers' International Association and Ontario Sheet Metal Workers' Conference for its affiliated local unions, effective from May 1st, 1980 until April 30th, 1982 ("the Provincial Agreement");

Re: Violations of the said Provincial Agreement by Culliton Brothers Limited

We are solicitors for Ontario Sheet Metal Workers' Conference ("the Conference") and wrote to Culliton Brothers Limited ("Culliton") under cover of January 14th, 1982 to inform you that, inter alia, Culliton is in violation of the Provincial Agreement in connection with work covered thereby at its construction projects in Ontario and to request that Culliton apply all of the terms and provisions of the said Provincial Agreement. We are informed by our client that Culliton has continued to violate all the terms of the Provincial Agreement, notwithstanding our letter.

Accordingly, we herewith give notice that the Conference on its own behalf and on behalf of its affiliated local unions and their unemployed members, herewith grieves that, from and after May 1st, 1980 and continuing as of the date hereof, Culliton has violated and continues to violate the Provincial Agreement in connection with work covered thereby ("the Work") at its construction projects in Ontario, including the projects referred to in the attached Schedule ("the Projects") in that, Culliton has failed or refused to apply any of the terms and provisions of the Provin-

cial Agreement to its employment of persons at its said Projects and, without limiting the generality of the foregoing, has failed or refused to:

1. employ only members in good standing in any of the affiliated local unions of the Conference, contrary to Article 8.1 of the Provincial Agreement;
2. sub-contract work only to employers who are bound by the Provincial Agreement, contrary to Article 9.1 thereof;

At all material times to this grievance, there have been, and still are,

- (a) members in good standing of the affiliated local unions of the Conference; and/or,
- (b) employers who are bound to the Provincial Agreement,

who are qualified to perform the Work at the Projects who are, and have been ready, willing and able to perform the Work for Culliton:

3. pay the proper hourly rates of pay, vacation pay, holidays and lost time pay and other premium rates of pay and allowances as set forth in and required by the Provincial Agreement and, in particular, the Appendices thereto;
4. contribute and make the required payments to the applicable local union Welfare Funds, Pension Funds, Supplementary Unemployment Insurance Benefit Funds, the Conference's Promotion Fund and Industry Fund and, where applicable, deductions for Union Dues and remit the same as and when required by the Provincial Agreement and the Appendices thereto;

RELIEF SOUGHT

- (i) A Declaration that Culliton has violated and continues to violate the Provincial Agreement and Appendices thereto as hereinbefore set forth;
- (ii) An Order that Culliton cease and desist from continuing to violate the Provincial Agreement and Appendices thereto as hereinbefore set forth;
- (iii) An Order that Culliton employ only members in good standing of the affiliated local unions of the Conference to perform work in connection with any of its Projects in accordance with the Provincial Agreement and the Appendices thereto;
- (iv) Further, or in the alternative, an Order that Culliton sub-

contract work covered by the Provincial Agreement only to employers who are bound by the said Provincial Agreement in accordance with Article 9 of the Provincial Agreement;

- (v) An Order that Culliton cease and desist from employing or continuing to employ persons at any of its Projects who are not members in good standing of any of the affiliated local unions of the Conference;
- (vi) An Order that Culliton forthwith apply the full terms and conditions of the Provincial Agreement and Appendices thereto to all of its employees who perform the Work at any of its Projects at which it may now or hereafter be engaged and, without limiting the generality of the foregoing, an Order that Culliton:
 - (a) pay the proper hourly rates of pay, vacation pay, holidays and lost time pay and other premium rates of pay and allowances as set forth in and required by the Provincial Agreement and, in particular, the Appendices thereto;
 - (b) contribute and make the required payments to the applicable local union Welfare Funds, Pension Funds, Supplementary Unemployment Insurance Benefit Funds, the Conference's Promotion Fund and Industry Fund and, where applicable, deductions for Union Dues and remit the same as and when required by the Provincial Agreement and the Appendices thereto;
- (vii) Damages against Culliton by reason of the aforementioned violations of the Provincial Agreement and Appendices thereto including interest at the current bank rate together with the delinquency penalties provided in the Appendices of the Provincial Agreement;
- (viii) An Order that Culliton pay to the Conference such fees and expenses, legal or otherwise, as it may have incurred by reason of the aforementioned violations of the Provincial Agreement and the Appendices thereto; and
- (ix) Such further and other relief as may be appropriate in the circumstances.

We wish to advise that we have been instructed to refer this grievance to arbitration by the Ontario Labour Relations Board pursuant to Section 124 of the Ontario Labour Relations Act.

On January 28, 1982, this referral was filed with the Board.

12. The respondent raised two issues in support of its position that there is no collective

agreement in effect between the applicant and the respondent. The respondent argued that the bargaining rights had been abandoned and, in the alternative, that the applicant was estopped from asserting any bargaining rights which might otherwise exist. The respondent argued that Local 47 never acted from 1976 onwards as if it had a collective agreement and that a delay of four and a half years in pressing its allegations of bargaining rights raised questions of abandonment and estoppel. The respondent emphasized that from August of 1976 until January of 1977, Local 47 did not enforce its bargaining rights and did not file a grievance. The respondent also pointed out that the current provincial agreement had been in effect for approximately twenty months before the applicant alleged that it had bargaining rights with respect to the respondent. The respondent relied on the fact that even though the respondent had been working extensively throughout Ontario it had not previously been approached by the applicant with the suggestion that the provincial collective agreement applied to the respondent. The respondent referred to the fact that Mr. Belleville gave notice to bargain in February of 1981 and then did nothing until December of 1981 when he decided to seek legal advice.

13. The respondent referred to its employees in Stratford and to the fact that, during the period when the applicant is now claiming bargaining rights, the respondent had given two yearly wage increases to its employees who had not had any contact with the applicant.

14. The respondent argued that Local 47 was not entitled to ask the Board to ignore its course of conduct over a period of four and a half years and that the applicant should not be entitled to present itself to the Board and say that a collective agreement is binding on the respondent and its employees. The respondent stressed that the reality is that at best the employees would be forced to become members of the applicant as a condition of employment under the terms of the provincial collective agreement. In the view of the respondent, the applicant was estopped by its conduct from asserting that the provincial collective agreement should apply to the respondent.

15. The respondent concedes that on August 24, 1976, it was bound by the collective agreement between Local 47 and MCAO, which was in effect from May 1, 1975, until April 30, 1977, by virtue of sections 127(2) and 128(4) of the Act. The respondent made this concession with hindsight at the hearing. Between August 24, 1976, and November 2, 1976, and for some time thereafter, neither the respondent nor Local 47 were aware of the results which flowed from the certification under a regime of accreditation and an existing collective agreement. On August 24, 1976, the respondent and Local 47 were bound by the terms of the collective agreement with respect to the geographic area set forth in the bargaining unit in the certificate of the Board in the industrial, commercial and institutional sector and the residential sector of the construction industry. It appears that the respondent's solicitor had forgotten about the certificate of accreditation and the results which flowed from it and that Local 47 was unaware of the effect of accreditation on its own certificate. The comedy of errors was compounded when Local 47 requested and received the appointment of a conciliation officer from the Minister of Labour followed by the subsequent decision of the Minister of Labour not to appoint a Board of Conciliation. Unhappily, such conduct in the face of an existing collective agreement is by no means unique. See, for example, *Kroman's Electric Limited* (Board File No. 1842-76-M, unreported decision dated March 16, 1977); *Napev Construction Limited* (Board File No. 1112-77-M, unreported decision dated December 28, 1977) and *Sinclair Welding Limited* (Board File No. 1914-79-R, unreported decision dated February 4, 1980).

16. The conduct of the respondent and Local 47 in purporting to bargain for a collective

agreement in 1976 and the subsequent appointment of a conciliation officer and the subsequent decision by the Minister of Labour not to appoint a Board of Conciliation was of no lawful effect with respect to the bargaining unit contained in the collective agreement which was in effect from May 1, 1975, until April 30, 1977. The respondent and Local 47 were prohibited by section 131(1) from individual bargaining with respect to the industrial, commercial and institutional sector and the residential sector. Moreover, the respondent and the employees represented by Local 47 would not have been in a position to engage in a lawful lock-out or a lawful strike with respect to the industrial, commercial and institutional sector and the residential sector having regard to the provisions of section 72(1).

17. The argument that bargaining rights have been abandoned requires consideration, bearing in mind the system of centralized collective bargaining that has been in place, initially, under a system of accreditation and subsequently under a system of provincial collective agreements which are negotiated between an employer bargaining agency and an employee bargaining agency. In *Newman Bros. Limited*, [1981] OLRB Rep. June 750, 761, the Board considered an argument with respect to the abandonment and stated:

45. There is, in the argument of the respondents, the concept that contact is necessary in order to maintain bargaining rights. However, where an affiliated bargaining agent or an employee bargaining agent has no reason to believe that a collective agreement is not being adhered to; the scheme of collective bargaining under the Act, whether under a system of accreditation or under province-wide bargaining, is not conducive to the personal contact which was often a *sine qua non* in the jurisprudence of the Board with respect to the principle of abandonment. Indeed, the Board has noted in *Dravo of Canada Limited*, [1977] OLRB Rep. Sept. 568, 572 that the lack of contact by a bargaining agent in the construction industry where there has been an absence of employees who would be covered by successive collective agreements would not support a finding of the abandonment of bargaining rights. While it may be debated that a bargaining agent might be more active and play a more investigative role in policing its collective agreements, such debates essentially relate to the adequacy or quality of representation rather than to the principle of abandonment. The disapproval of the Board with respect to the quality of representation has not in itself caused the Board to find an abandonment of bargaining rights. In this regard, see *The Borden Company Limited* case, [1976] OLRB Rep. July, 379, 382.

The respondent states that it is arguing the abandonment of bargaining rights. In the Board's jurisprudence the abandonment of bargaining rights has invariably been raised either where there is clearly no collective agreement or where there is a dispute as to whether a collective agreement is in effect through a process whereby a collective agreement has renewed itself due to a failure to give timely notice under the terms of a collective agreement. In subsequent paragraphs, the Board will trace the continuation of the bargaining relationship and the series of collective agreements which came into effect and which were binding on the applicant and the respondent.

18. While the respondent states that it is arguing the abandonment of bargaining rights, in our view, such an argument is not tenable. The Board characterizes the argument of the

respondent as the abandonment of collective agreements, which unknown to the applicant, the respondent, Local 47, and the Group were applicable to them at various times and places. These collective agreements came into effect and were applicable to employers and trade unions beyond the immediate parties to the collective agreements by virtue of provisions of a public statute known as the *Labour Relations Act*. The application of these collective agreements under the provisions of the *Labour Relations Act* to the applicant, the respondent, Local 47 and the Group arose independently of their awareness by virtue of the operation of law. In these circumstances, the Board is not prepared to find that there has been an abandonment of bargaining rights or collective agreements.

19. As the Board noted earlier, the collective agreement between Local 47 and the MCAO expired on April 30, 1977. A new collective agreement between the same parties was made on May 20, 1977, and came into effect on May 1, 1977, with an expiration date of April 30, 1978. The respondent was once again bound by the terms of this collective agreement with respect to the geographic area set forth in the bargaining unit in the certificate of the Board in the industrial, commercial and institutional sector and residential sector of the construction industry. The amendments contained in *The Labour Relations Amendment Act, 1977*, S.O. 1977, c. 31 (often referred to as Bill 22) introduced the concept of province-wide bargaining and province-wide collective agreement between employer bargaining agencies and employee bargaining agencies in the industrial, commercial and institutional sector of the construction industry. In an employer bargaining agency designation dated March 21, 1978, made pursuant to section 127(1)(b) [now sector 139(1)(b)], the Minister of Labour designated the Group as the employer bargaining agency to represent in bargaining all employers whose employees were represented by certain affiliated bargaining agents (including Local 47). In an employee bargaining agency designation dated April 12, 1978, made pursuant to section 127(1)(a) [now sector 139(1)(a)], the Minister of Labour designated the Sheet Metal Workers' International Association and The Ontario Sheet Metal Workers' Conference consisting, *inter alia*, of Local 47, as the employee bargaining agency to represent in bargaining all journeymen and apprentice sheet metal workers, sheeters, sheeters' assistants and material handlers represented by certain affiliated bargaining agents (including Local 47 and the applicant).

20. Province-wide collective agreements were entered into with respect to the industrial, commercial and institutional sector of the construction industry between the employee bargaining agency and the employer bargaining agency referred to in the preceding paragraph. The first collective agreement was effective from May 29, 1978, until April 30, 1980. The second collective agreement became effective from May 1, 1980, until April 30, 1982. However, this second collective agreement became effective on the date that *The Labour Relations Amendment Act, 1979 (No. 2)* S.O. 1979, c. 113 (often referred to as Bill 204) came into effect. One of the effects of this amendment is now to be found in section 137(2) of the Act which provides:

Where an employer is represented by a designated or accredited employer bargaining agency, the employer shall be deemed to have recognized all of the affiliated bargaining agents represented by a designated or certified employee bargaining agency that bargains with the employer bargaining agency as the bargaining agents for the purposes of the collective bargaining in their respective geographic jurisdictions in respect of the employees of the employer employed in the industrial, commercial or institutional sector of the construction industry referred

to in clause 117 (e), except those employees for whom a trade union other than one of the affiliated bargaining agents holds bargaining rights.

The respondent is represented by a designated employer bargaining agency and is deemed to have recognized all of the affiliated bargaining agents represented by a designated employee bargaining agency as the bargaining agents for the purpose of collective bargaining in their respective geographic jurisdictions in respect of the employees of the respondent employed in the industrial, commercial or institutional sector of the construction industry. It is through the series of steps referred to in this paragraph and paragraphs 16, 17, 18, 19 and 20 that the respondent is bound by the province-wide collective agreement which became effective from May 1, 1980, and which remains in effect until April 30, 1982.

21. The argument that the applicant is estopped by its conduct from asserting that the province-wide collective agreement should apply to the respondent raises the issue of whether estoppel may be raised by a party to prevent the operation of a public statute. The application and coverage of the present province-wide collective agreement and the extent to which previous collective agreements, which have been binding on the respondent since 1976, have come into operation as a result of the operation of a public statute — the *Labour Relations Act*. It is well established that the doctrine of estoppel cannot be evoked to prevent the operation of a public statute, see *Maritime Electric co. v. General Davies Ltd.*, [1937] A.C. 610; *MacKenzie v. Moore's Taxi Co. Ltd.*, [1938] 2 D.L.R. 195, 199; *Southend-on-Sea Corporation v. Hodgson (Wickford, Ltd.)*, [1961] 2 All E.R. 46; and *Walls v. Hanson* (1965) 49 D.L.R. (2d) 435, 438. The Board is not prepared to find that the applicant is estopped by its conduct from asserting that the province-wide collective agreement applies to the respondent.

22. The position of the respondent's present employees who are not members of the applicant raises an important question. In section 137(2), the Legislature extended bargaining rights by means of deemed recognition of affiliated bargaining agents. This section is silent on the wishes of such employees. It was not suggested that the applicant is under any requirement either to offer these employees membership or not to require the termination of their employment with the respondent.

23. The Board has determined that there is a collective agreement in effect and directs the Registrar to list the matter for continuation of hearing on the issue of the amount of damages. The question of the position of the respondent's present employees may be raised at that time.

2544-81-R United Steelworkers of America, Applicant, v. Diepdaume Mines Limited, Respondent

Bargaining Unit – Build-up – Certification – Board policy on bargaining units in mining industry – Different appropriate units for various stages of mining operation – Whether build-up principle applies

BEFORE: D. E. Franks, Vice-Chairman, and Board Members J. Wilson and W. F. Rutherford.

APPEARANCES: *J. deKlerk for the applicant; Peter Heslin for the respondent.*

DECISION OF THE BOARD; March 30, 1982

1. This is an application for certification.

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3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

4. The applicant in this case has applied for certification of a group of employees of the respondent. The respondent takes the position that the present application is premature. The respondent is currently performing work on an abandoned gold mine. The work involves dewatering the shaft and rebuilding much of the bracing in the existing mine. However, the respondent admits that it has no fixed plans concerning any build-up of employees at the mine. Indeed, the respondent took the position that future development was contingent upon too many unpredictable factors to enable such plans to be made. In such circumstances, therefore, it is clear that the Board could not postpone consideration of the application on the basis of a proposed build-up of employees. (See, for instance, *United Asbestos Inc.* [1974] OLRB Rep. April, 234, for an example, where the build-up principle is applied in a mining operation.)

5. Clearly, however, the Board cannot deny the present employees of the respondent their right to participate in collective bargaining under the *Labour Relations Act*. Notwithstanding the Board's use of the build-up doctrine in mining, the Board has also approached the various stages of mining operations by setting out different appropriate bargaining units for the various stages. This policy is set out in the *Surluga Gold Mines Limited* case, [1967] OLRB Rep. July, 253 which reads in part as follows:

"4. It has been the practice of the Board for many years to find three types of bargaining units appropriate for collective bargaining in mining operations. During the period that the mine site is under construction it is the Board's practice to find that a bargaining unit of all employees engaged in the "construction stage" of the mining operations to be appropriate for collective bargaining. After the construction stage has been completed and during the time that the mine is being developed it is the Board's practice to find that all employees engaged in the "development stage" of the mining operations are appropriate for

collective bargaining. Finally, when the development of the mine has been completed and the mine has entered the "production stage" of its operations, it is the Board's practice to determine that a bargaining unit of all employees of the respondent in its mining operations (without qualification) is the appropriate unit for collective bargaining.

5. It has been the Board's practice to find that a mine has entered the production stage of its operations at such time as the ore which has been mined during the development stage ceases to be stock-piled and is either shipped or processed through a mill at the mine site.

6. In the instant case, it would appear that the mine has passed the construction stage of its operations since the respondent has taken over the operation of the mine from the contractor constructed the mine. It would further appear from the evidence that since the ore presently being mined is being stock-piled and is awaiting the completion of the mill, the construction of which is to be commenced during the fall of 1967, that the mine is presently in its development stage.

7. It has been the Board's long standing practice to determine that the three bargaining units described above are appropriate in order to reconcile the build-up situation with the desire of the employees who seek collective bargaining during the various stages of a mine. In applying the build-up principle in mining operations, it is the Board's practice therefore to ascertain which stage a mine has reached in order to determine the appropriate bargaining unit rather than direct a vote of all employees at some future date when the production stage of a mine has been reached and a representative number of employees have been employed."

The facts in the present case would appear to fit in with the development stage referred to above. The applicant could advance no reason why we should depart from the established practice set out above. Accordingly, we propose to find as appropriate in the present case a bargaining unit limited to the development stage.

8. Accordingly, the Board finds that all employees of the respondent engaged in the development stage of its mining operations in South Porcupine, Ontario, save and except foremen, shift bosses, persons above the rank of foreman and shift boss, office and clerical staff, employees in the laboratory and in the engineering geological and metallurgical departments, security guards and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

7. The Board is satisfied, on the basis of all of the evidence before it, that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on March 17, 1982, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

8. A certificate will issue to the applicant.

0722-81-R Service Employees Union, Local 204 Affiliated with A.F. of L., C.I.O., C.L.C., Applicant, v. **Extendicare Diagnostic Services**
 Division of Extendicare Limited, Respondent, v. Group of Employees, Objectors

Bargaining Unit – Employee – Whether persons employed in employer's diagnostic services division "hospital employees" within meaning of *Hospital Labour Disputes Arbitration Act* – Policy reasons for not including hospital employees in same unit as other employees

BEFORE: Kevin M. Burkett, Alternate Chairman, and Board Members F.W. Murray and M.J. Fenwick.

APPEARANCES: *Naomi Duguid and Allen Ferens for the applicant; Donald J. McKillop, Q.C., Dawn Jeffrey and Joyce Allin for the respondent; no one appeared for the objectors.*

DECISION OF THE BOARD; March 11, 1982

1. This is an application for certification.
2. The company operates a diagnostic services division from eleven laboratory locations throughout Metropolitan Toronto. Medical diagnostic testing services are offered to the public and in addition the service is provided to the company's own and other nursing homes. The union has applied to be certified as bargaining agent for the employees working within the company's diagnostic services division.
3. In a decision dated August 17, 1981, the Board found all employees of the respondent in Metropolitan Toronto save and except supervisors, persons above the rank of supervisor, office and clerical employees and sales staff, to be a unit appropriate for collective bargaining. The Board appointed a labour relations officer to meet with the parties and inquire into whether or not seven persons whose names are shown on Schedule A are employees of the respondent who fall within the bargaining unit and whether or not another seven persons whose names are shown on Schedule B are employees of the respondent who fall within the bargaining unit. The Board also satisfied itself of the applicant's entitlement to a vote regardless of its ultimate determination with respect to the challenged employees. The Board then directed the taking of a representation vote with the ballots cast by those whose status had been challenged to be segregated.
4. A vote was held on September 29, 1981. Seventy-three persons cast ballots. Thirty-five ballots were cast in favour of the applicant union. Twenty-nine ballots were cast against the applicant union and nine ballots were segregated pending the completion of the Board Officer's inquiry and a determination by the Board as to whether the persons whose ballots had been segregated are employees within the bargaining unit. The Board Officer convened a meeting of the parties on October 19, 1981, at which the issues between the parties in respect to the challenged individuals were clarified. It has now been agreed between the parties that only six of those who cast segregated ballots may be employees of the respondent in respect of whom examinations are required.
5. The issue to be determined in this decision is whether two of those whose ballots have been segregated, and a number of others whose ballots have been counted, are "hospital

employees” within the meaning of the *Hospital Labour Disputes Arbitration Act*, R.S.O. 1980, c. 205, and whether, if “hospital employees” they should be in a bargaining unit, with employees who are not “hospital employees”. The background to the issue before us is sketched in the Board’s December 21, 1981 interim decision in this matter as follows:

“4. During the course of the inquiry into the employee status of two of the persons’ whose names had been included on Schedule B it was revealed that these two persons spent all of their working time at the Highbourne Nursing Home. It is not disputed that Mrs. Murgatroyd takes blood samples from nursing home residents and Ms. Watts performs electrocardiograms on nursing home residents. The Board examinations in respect of these two persons were conducted on October 26, 1981. By letter dated November 16, 1981 the applicant union took the position that these two persons are ‘hospital employees’ within the meaning of the *Hospital Labour Disputes Arbitration Act* and therefore, should be excluded from a bargaining unit composed of employees who are not ‘hospital employees’ within the meaning of the Act. The applicant union argued that the transcript of the examination of these two individuals should be released as soon as possible and a decision made on the basis of the evidence contained in the transcripts. The applicant argued further in its letter of November 26, 1981 that if any additional evidence is required it should be heard by the Board and not by a Board Officer. If either one of these two persons are excluded from the bargaining unit the applicant takes the position that on the basis of the vote it would then be entitled to interim certification. The respondent, by letter dated November 18, 1981 asked the Board not to expand the scope of the issues in dispute and requested a hearing on the issue. In a subsequent letter dated December 1, 1981 the respondent argued that the applicant should have moved sooner and, further, if the Board accedes to its request it will be permitting, contrary to long-standing Board practice, an alteration to the terms of reference of the examinations as well as an alteration to the bargaining unit decision of the Board.

5. The Board convened a hearing for the purpose of entertaining the submissions of the parties in respect of this matter on Monday, December 14, 1981. At the hearing counsel for the respondent company advised the Board that in addition to the two persons identified by the union as ‘hospital employees’ there are a number of other ‘hospital employees’ who have been included in the bargaining unit and who have voted and had their ballots counted.

6. The Board ruled at the hearing that:

- The issue of the status of Ms. Watts and Mrs. Murgatroyd as ‘Hospital employees’ within the meaning of the *Hospital Labour Disputes Arbitration Act* was raised in a timely fashion.
- It is satisfied that arguably there are strong policy reasons for

not including 'hospital employees' within a bargaining unit of employees not covered by the *Hospital Labour Disputes Arbitration Act*.

- It is prepared to make a determination as to whether the two employees referred to by the trade union as 'hospital employees' and those who may be identified by the company as 'hospital employees' are in fact 'hospital employees' within the meaning of the *Hospital Labour Disputes Arbitration Act*.
- It is not prepared to rely on the transcripts of the examinations conducted for another purpose in making its determinations in this regard.

7. Having made these rulings the Board hereby advises the parties that it will hear all evidence and argument in respect of whether or not Ms. Watts, Ms. Murgatroyd and those identified by the respondent as 'hospital employees' are 'hospital employees' within the meaning of the *Hospital Labour Disputes Arbitration Act* and if so whether they should be excluded from the bargaining unit determined by the Board in this case to be appropriate for collective bargaining. The Registrar is directed to list this matter for hearing.

6. At the February 2, 1982 hearing to deal with this, the Board advised the parties that it would hear evidence and argument in respect of whether or not Ms. Murgatroyd and Ms. Watts are "hospital employees" and would make a determination in respect of their status before proceeding further. If either one of these two is found to be a "hospital employee" and excluded from the bargaining unit, thereby causing her ballot not to be counted, it will be necessary to hear evidence and argument in respect of the nine employees whom the respondent maintains are identical in status to Ms. Watts and Ms. Murgatroyd. If, however, neither one of these two is found to be a "hospital employee" there will be no need to proceed further.

7. Ms. Barb Murgatroyd works for the respondent two days per week as a vena puncture technician, taking blood samples from the residents at Highbourne Nursing Home. She does not perform any other work for the respondent employer. She commences her work at about 6:45 a.m. and proceeds on the basis of requests made by medical doctors responsible for the medical care of the nursing home residents. She is usually finished taking the required samples about 11:00 a.m. at which time she takes the samples from the Nursing Home to the Extendicare Diagnostic Service lab which is located next door at 400 The East Mall. She reports to Marion Gord, the charge technician, who accepts the samples and discusses whatever difficulties Mrs. Murgatroyd may have encountered in carrying out her responsibilities. The actual testing is done by Extendicare Diagnostic Services Division employees at either 400 The East Mall or at a central lab on Bathurst Street. Extendicare Diagnostic Services operates a fleet of cars to courier samples and test results between its satellite laboratories, its central lab and its customers. The supplies and equipment which Ms. Murgatroyd uses at the Highbourne Nursing Home are supplied by Extendicare Diagnostic Services. She was hired by Extendicare Diagnostic Services to work at Highbourne Nursing Home. She is paid by Extendicare Diagnostic Services.

8. Ms. Ann Watts works seven hours per week performing cardiograms on the residents of the Highbourne Nursing Home. She too was hired by and is paid by Extendicare Diagnostic Services and uses supplies and equipment provided by Extendicare Diagnostic Services. Ms. Watts does not perform any other work for Extendicare Diagnostic Services. The cardiogram charts are taken by Ms. Watts from the Highbourne Nursing Home to a cardiologist located in the adjacent building at 400 the East Mall. A cardiologist, who is retained by Extendicare Diagnostic Services, reads the cardiograms. Whenever Ms. Watts or Ms. Murgatroyd are unavailable to carry out their duties, replacements are provided by Extendicare Diagnostic Services.

9. The union argues that on the statutory definition of "hospital employee" the identity of the employer is irrelevant. The definition is framed in terms of "the operation of a hospital" and accordingly, it is the position of the union that anyone who is regularly employed in job functions which are necessary to the operation of a hospital is a "hospital employee" within the meaning of the *Hospital Labour Disputes Arbitration Act*. The union argues that both Ann Watts and Barb Murgatroyd spend virtually all of their working time in the nursing home performing duties which are critical to the health care of the residents. In these circumstances, the union takes the position that the extent of the Extendicare Diagnostic Services organization and the fact that Extendicare provides the supplies and equipment is irrelevant. The union asks the Board to find that these two persons are "hospital employees" within the meaning of the *Hospital Labour Disputes Arbitration Act*.

10. The company argues that, on the evidence, control over these employees is exercised by Extendicare Diagnostic Services, the skills required, as evidenced by the supplying of replacements, is provided by Extendicare Diagnostic Services, and the Administration of the overall testing function is the responsibility of Extendicare Diagnostic Services and not Highbourne Nursing Home. Having regard to these facts, the company asks us to conclude that the persons whose status is in dispute, organizationally at least, are employed, not in the operation of a hospital, but in the operation of a laboratory testing service. The company submits that the function performed is one which should also cause the Board to conclude that these persons are not employed in the operation of a hospital. The company argues that under the *Nursing Homes Act* R.S.O. 1980, c. 320, which governs the operation of nursing homes in the province of Ontario, a nursing home is not required to do either bleeding or electrocardiograms. The company argues that while these functions are not necessary to the operation of a nursing home, they are necessary to the operation of a laboratory testing service. Where the evidence suggests that on both an organizational and functional basis the persons whose status is in dispute are not employed in the operation of a hospital, and considering the practicality of having two employees of Extendicare Diagnostic Services bargaining under the *Hospital Labour Arbitration Act* and the remainder not, the company submits that the Board should find them not to be "hospital employees" within the meaning of the Act.

11. The relevant definitions under the *Hospital Labour Disputes Arbitration Act* are:

"hospital" means any hospital, sanitarium, sanatorium, nursing home or other institution operated for the observation, care or treatment of persons afflicted with or suffering from any physical or mental illness, disease or injury or for the observation, care or treatment of convalescent or chronically ill persons, whether or not it is granted aid out of moneys

appropriated by the Legislature and whether or not it is operated for private gain, and includes a home for the aged.

“hospital employee” means a person employed in the operation of a hospital.

There is no dispute that Highbourne Nursing Home is a hospital within the meaning of the *Hospital Labour Disputes Arbitration Act*. It is to be observed, however, that Highbourne is a Nursing Home within the meaning of the *Nursing Homes Act*; the Act governing the operation of nursing homes in the province of Ontario, and not a hospital within the meaning of the *Public Hospital Act*, R.S.O. 1980, c. 410; the Act which governs the operation of public hospitals in the province. We will have more to say with respect to this distinction in determining whether either Barb Murgatroyd or Ann Watts is a “hospital employee” within the meaning of the *Hospital Labour Disputes Arbitration Act*.

12. The Board has never before been faced with a dispute as to whether an individual is a “hospital employee” within the meaning of the *Hospital Labour Disputes Arbitration Act*. In order to make this determination we must look to the language of the definition read in the context of a statute whose overriding purpose is to prohibit work stoppages occasioned by labour disputes. The legislature has determined that the need of the public to uninterrupted hospital services takes precedence over the right of certain individuals to resort to economic sanctions in support of collective bargaining objectives. It is against this backdrop that effect must be given to the definition of who is a hospital employee. This is not to say, however, given the statutory encroachment upon individual freedoms, that the Board should not be circumspect in applying the definition.

13. We start by observing that the definition carefully avoids restricting the application of the statute to only those employed by a hospital. The definition extends to all persons “employed in the operation of a hospital.” Given the purpose of the statute and the multiplicity of business arrangements under which an organization such as a hospital can meet its objectives, it is not surprising that the definition focuses, not on the identity of the employer, but on the function performed by those whose services are so important to society as to abridge their right to free collective bargaining.

14. The term “hospital” as defined in the *Hospital Labour Disputes Arbitration Act* includes hospitals, sanitariums, sanatoriums, nursing homes and certain other types of institutions. Because it is a person’s function which is determinative of whether that person is a “hospital employee” and because a number of different types of institutions are covered by the definition of “hospital” contained in the *Hospital Labour Disputes Arbitration Act*, we accept that when determining if a person is a “hospital employee” reference should be had to the type of institution within which or to which that person provides a service or performs a function and to the statute which specifies the services which that institution is required to provide. At the least, it is the uninterrupted delivery of these services which the *Hospital Labour Disputes Arbitration Act* is designed to ensure.

15. A “hospital” is defined under the *Public Hospital Act* as:

... any institution, building or other premises or place established for the treatment of persons afflicted with or suffering from sickness, disease or

injury, or for the treatment of convalescent or chronically ill persons that is approved under this Act as a public hospital.

A “nursing home”, on the other hand, is defined under the *Nursing Homes Act* as:

... any premises maintained and operated for persons requiring nursing care or in which such care is provided to two or more unrelated persons, but does not include any premises falling under the jurisdiction of:

(vii) the Public Hospitals Act.

16. Neither the *Nursing Homes Act* nor the regulations thereunder stipulate that a nursing home is required to provide facilities for the carrying out of routine laboratory investigations. In contrast, under the regulations to the *Public Hospitals Act* a hospital is required to be equipped with a clinical laboratory with facilities and staff able to make routine laboratory investigations necessary for the treatment of patients. Regulation 33(1) reads:

A hospital shall be equipped with a clinical laboratory with facilities and staff able to make routine laboratory investigations necessary for the treatment of the patients in the hospital.

By virtue of the combined operation of the *Hospital Labour Disputes Arbitration Act* and the *Public Hospitals Act*, the public is provided with uninterrupted access to clinical laboratory testing facilities. The medical staff of a nursing home has access to these facilities or to private facilities such as those maintained by Extendicare Diagnostic Services.

17. Where, as in this case, the employees whose status is in issue are employed by an organization (Extendicare Diagnostic Services) which is not a “hospital” within the meaning of the *Hospital Labour Disputes Arbitration Act* and where, as in this case, the function they perform is not one which is statutorily required of the institution in respect of which they carry out their function, support is found for the conclusion that they are not employed in the operation of that institution within the meaning of the *Hospital Labour Disputes Arbitration Act*. Where, in addition, the institution has uninterrupted access to the function performed by the persons in dispute through the public hospital system or through alternate private suppliers, it is difficult to conclude, given the balancing of interests which must take place, that the legislature intended to deny those performing the function the right to engage in free collective bargaining.

18. Having regard to all of the foregoing, we are forced to conclude that neither Barb Murgatroyd nor Ann Watts is a “hospital employee” within the meaning of the *Hospital Labour Disputes Arbitration Act*.

1353-81-R International Association of Bridge, Structural and Ornamental Ironworkers Local 721 and all other Ontario Locals 700, 736, 765, 786 and Ironworkers District Council of Ontario, Applicant, v. **Folgor Construction Limited**, Respondent, v. International Union of Operating Engineers, Local 793, Intervener #1, v. The Formwork Council of Ontario, Intervener #2, v. Labourers' International Union of North America, Local 183, Intervener #3.

Certification – Construction Industry – Practice and Procedure – Strike – Employer coerced into hiring members of applicant by threat of picket line – Whether amounting to threat of unlawful strike – Whether persons hired employees for purposes of Act – Whether Board staying certification proceedings pending outcome of jurisdictional dispute complaint

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members H. J. F. Ade and C. A. Ballentine.

APPEARANCES: *Maurice A. Green and John Donaldson for the applicant; Gary Walker and Domenic Faga for the respondent; A. M. Minsky and Q. Ceolin for the interveners.*

DECISION OF N. B. SATTERFIELD, VICE-CHAIRMAN AND BOARD MEMBER H. J. F. ADE; March 30, 1982

1. This is an application for certification in the construction industry made pursuant to the provisions of section 144(1) of the *Labour Relations Act*. The applicants are applying on their own behalf, on behalf of the rodmen designated employee bargaining agency and on behalf of all other affiliated bargaining agents of the employee bargaining agency to be certified to represent all rodmen employed by Folgor in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario. The application was listed for hearing for the purpose of hearing the evidence and representations of the parties with respect to various matters arising out of the interventions and an allegation contained in the reply to the application that, prior to the making of the application, "... the applicant unlawfully coerced the respondent to employ two of its members ...".

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4. Counsel for the interveners asked the Board at the hearing to stay this application pending the determination of a jurisdictional complaint which had been filed with the Board by the International Association of Bridge, Structural and Ornamental Ironworkers, Local 721 ("Local 721") on September 4th, some two weeks prior to this application. The complaint was in process at the pre-hearing conference stage. Counsel's reasons underlying his request included his contention that there would be substantial overlapping evidence and, therefore, the attendant risk of different findings being made on the evidence because of the likelihood that the two matters would be heard by the Board, differently constituted in each case. The Board, after hearing the representations of the parties, refused to grant the request for the stay of proceedings on the grounds that the issues which are alleged to overlap include representation issues which are more properly dealt with in a certification proceeding than in a proceeding with respect to a jurisdictional complaint. The parties then agreed that the Board should deal with the threshold issue of whether that applicant unlawfully coerced the

respondent to employ two of its members, since that would determine whether the application was to proceed. Accordingly, this decision is an interim one dealing with that single issue.

5. The findings of fact herein reflect the Board's assessment of the evidence of five witnesses having regard for the consistency of their evidence, the reliability of their recollection of events, their ability to resist the influence of interest to modify their recollections, their relative credibility and their demeanor. In one instance of substantial contradiction in the evidence of two witnesses, the Board has dealt separately with the resolution of that conflict.

6. The construction project on which the employees affected by this application were working is located at Victoria Park and Lawrence Avenue East in Metropolitan Toronto. Lormark Limited ("Lormark") was acting as general contractor of the project and its superintendent was Mr. Ernest Perrier. Work on the project began in June 1981 and before the end of the month the respondent Folgor Construction Limited ("Folgor"), a formwork contractor engaged under sub-contract from Lormark, began work on the project. At the times material to this application Folgor had from 10 to 12 employees on the project, three or four of whom were doing the reinforcing work. They were members of intervenor #3 ("Local 183"). It is Folgor's consistent practice to use members of Local 183 on reinforcing work and, prior to the events giving rise to this application for certification, it has not employed members of the International Association of Bridge, Structural and Ornamental Ironworkers.

7. While counsel for the interveners based his application for a stay of these proceedings on a jurisdictional complaint pending before the Board in which Local 721 is the complainant and Folgor and Local 183 are the respondents, the Board's records reveal that it is the second such complaint to be filed with the Board. The disputed work in both complaints is the placing of reinforcing steel in walls and footings at the job site involved in the instant application. The relief sought in both applications included, in part, an order of the Board that Folgor sign a collective agreement with Local 721. Each complaint was signed by Allan MacIsaac, Business Manager and Financial Secretary of Local 721. The first complaint was filed July 17th and asserts that Local 721 was first aware of the reinforcing work being done by members of Local 183 by July 10th, on which date it attempted to get Folgor's superintendent to change the assignment to members of Local 721. Local 721 also approached Local 183 in an attempt to resolve the dispute on July 15th. The first complaint, Board File No. 0884-81-JD, was withdrawn on September 4, 1981 coincident with the filing of the second complaint, Board File No. 1252-81-JD.

8. At the beginning of September, the structural steel contractor began work on the project employing an erection crew of five ironworkers. It may be inferred readily from the evidence that they were members of Local 721. Around the end of the first week in September, the steward of the erection crew told Perrier that Folgor's men should be taken off the work of placing reinforcing steel or the ironworkers doing the structural steel work would walk off the job. Perrier took no action and nothing happened. According to Perrier, the incident with the steward occurred about one week before John Donaldson, President of Local 721, visited the project on the morning of September 16th and approached Perrier about the reinforcing work. Perrier's version of what transpired between him and Donaldson at that time differs substantially from Donaldson's version which is dealt with later in this decision. In his examination-in-chief, Perrier told the Board that Donaldson advised him that he should stop using labourers for the reinforcing work or there could be pickets at the project the next day.

Under cross-examination by Local 721 counsel, he was uncertain whether it was Donaldson or the Ironworker steward who had threatened the picketing of the project, but he was certain that one or the other told him that pickets would be placed at the project if members of Local 183 continued to place reinforcing steel. Perrier, who has some twelve years experience as a superintendent in construction, believed that the other trades on the project, all of which were represented by unions, would not cross a picket line if one was established. Since he did not want any delay in the project, he immediately told George Pietroangelo, Folgor's general foreman, that there would be a picket line on the job if Folgor did not take their men off the reinforcing work and replace them with members of Local 721. Perrier told Pietroangelo that he was not prepared to have the job delayed and that Pietroangelo better do as Perrier was telling him. Pietroangelo reported this conversation to his own boss and this led ultimately to consultations between principals of Folgor and Lormark. As a result of those consultations, Pietroangelo was instructed by his superior later the same day to put ironworkers on the reinforcing work. Pietroangelo obtained Donaldson's name and telephone number from a business card which was stuck up on a wall of Perrier's office and to which Perrier had directed him. Perrier had been given the card by Donaldson that morning and had placed it on the wall where he kept other business cards. Pietroangelo phoned Local 721 that same afternoon and ordered two ironworkers.

9. Local 721 referred two of its members for work with Folgor on September 17th. Pietroangelo put them to work on the reinforcing steel and re-assigned his labourers to other work. When Local 721 gets a request from a contractor which is not bound to an appropriate ironworkers' collective agreement, its standard practice is to have the members assigned to work with the contractor sign a proof of membership form which is then filed as evidence of membership support for an application for certification. Local 721 was following this practice when it filed this application by registered mail on September 21st on behalf of the applicants. It is dated September 18th and signed by MacIsaac.

10. As indicated above, there was substantial contradiction in the testimony of Donaldson and Perrier as to what took place between them when Donaldson visited the project on September 16th. Donaldson's version is that he had just returned to his regular duties with Local 721 after being on leave of absence for most of the summer and, as he does customarily, was driving around the territory for which he is responsible when he noticed a crane hoisting steel. He drove to the site where the crane was at work. He saw workers placing reinforcing steel and spoke to one of them. He learned that the work was being done by labourers. Next he spoke to the steward on the structural steel erection crew and admonished him for not being aware that the reinforcing steel was being placed by labourers rather than ironworkers. He then sought out Perrier and asked him if he was aware that members of Local 183 were doing the reinforcing work and that it should be done by members of Local 721. His testimony was that he spent four or five minutes discussing this with Perrier who volunteered to correct the situation. He testified further that, while he was with Perrier for approximately twenty minutes, there was no reference to the possibility of there being any "trouble" or about pickets. They spent the rest of the time looking at drawings of the project and discussing the progress of the work.

11. Donaldson admitted in cross-examination that he approached Perrier in order to have Lormark act to get Folgor to take members of Local 183 off the reinforcing steel and replace them with members of Local 721. He also admitted that, while he had disclaimed any knowledge of the project prior to coming across it on September 16th, he would have heard

from other representatives of his union if they had known Local 183 members were on the job doing reinforcing work. He acknowledged that he was aware of the second jurisdictional dispute complaint, that it was a complaint against Local 183 and that it had been discussed with him but he could not remember when. He admitted also that the steward for the ironworkers on the structural steel erection would have been responsible for representing ironworkers if they had been working on the reinforcing steel.

12. Whichever version of Donaldson's visit to Perrier the Board accepts, there are no grounds for the Board doubting the credibility of Perrier and Pietroangelo as to how Perrier reacted to Donaldson's visit and how Folgor in turn responded to Lormark's instructions that delay of the project would not be tolerated and if it was necessary to replace labourers on reinforcing steel with ironworkers in order to avoid delay, it was expected that Folgor would comply. Yet, according to Donaldson's version, he and Perrier had a friendly chat of which only four or five minutes was given over to the problem of labourers doing the reinforcing work, which, according to Donaldson, belonged to members of Local 721. As a result of the chat Perrier volunteered to resolve that problem. Not only are the details of each version in disagreement, Perrier's reaction to Donaldson's visit is wholly out of keeping with what Donaldson claims was the nature of their conversation. That anomaly alone makes it difficult for the Board to attach any credibility to Donaldson's version of his conversation with Perrier. That difficulty is only increased by the fact that Donaldson initially denied that he had knowledge of the project prior to his visit, that he later acknowledged that he would have been told if another ironworker representative had been aware of labourers doing the reinforcing work and the fact that he also later admitted that the second jurisdiction complaint had been discussed with him. When these admissions are juxtaposed with the fact that Donaldson's boss signed both jurisdiction complaints, that the ironworkers had been aware of the labourers presence on the project since at least July 10th, that the second jurisdiction complaint was filed about the same time that the structural steel erection crew made up of members of Local 721 arrived on the project, lead the Board to reject Donaldson's version of his conversation with Perrier as not credible.

13. While Perrier could not be certain whether it was the ironworker's steward or Donaldson who told him that the project would be picketed if the labourers who were doing the reinforcing work were not replaced with ironworkers, he was certain that one or the other of them made the statement. Whichever made it, it was made by an official or agent of the ironworkers and, from his experience in the construction industry, Perrier equated that threat with the prospect of the project being delayed because he expected that the other trades would not cross the picket line until the labourers were removed from the reinforcing work. Even if Perrier's fear that the other trades would refuse to cross the picket line was seen to be unfounded, he had also been threatened by the ironworkers steward with the prospect of the structural steel men walking off the job if he failed to have the labourers removed from the placing of reinforcing steel. The reality of the construction industry is such that Perrier would have been naive in the extreme if he had not expected the structural steel crew to observe an ironworker picket line.

14. While Perrier may have been uncertain under cross-examination whether it was the steward or Donaldson who threatened to have the project picketed, the Board is satisfied that the circumstantial evidence of the events which ensued Donaldson's visit to the project strongly supports the finding that it was Donaldson who made the threat and the Board so finds. This threat was made on September 16th, approximately one week after the steward on

the structural steel crew threatened Perrier with the possibility that the employees on the crew would walk off the job if labourers continued to do the reinforcing work.

15. Counsel for Folgor and Local 183 both contend that Folgor was compelled by the threat of picketing, which they allege is threatening an unlawful strike, to request men from Local 721. Therefore the threat set up the opportunity for the application for certification to be filed. It is the compelling of that request from Folgor for Local 721 members which counsel for Local 183 argues vitiates the application for certification because the threat put Folgor in the position of choosing between complying with Local 721's demand to use its members to do the reinforcing work on the one hand, or on the other being seen by Lormark as the cause of delaying the project and possibly being removed from the project by Lormark.

16. Both counsel agree as well on the legal consequences which should flow from Local 721's conduct. Although the details of their arguments differ, they had a common thrust. They argue that, for the Board to allow Local 721 to engage in such conduct for purposes of promoting an opportunity to obtain bargaining rights would be to allow it, and consequently other trade unions as well, to circumvent the orderly procedures prescribed by the Act for obtaining bargaining rights, all of which would be contrary to the spirit of the Act.

17. They rely on the Board's decision in *Radio Lunch (Sudbury)* 50 CLLC ¶17,012, *Robert McAlpine Ltd.*, [1961] OLRB Rep. June 178 and *United Brotherhood of Carpenters and Joiners of America* [1978] OLRB Rep. August 776 which they assert stand for the principle that the Board will refuse to entertain an application for certification if the applicant is at the same time engaged in an unlawful act (*Radio Lunch* and *McAlpine*) and that an unlawful act connected with an attempt to gain or extend bargaining rights by voluntary recognition is contrary to the scheme and purpose of the Act (*United Brotherhood*). In *Radio Lunch* and *McAlpine* the unions were seeking to advance their claim for bargaining rights by engaging in unlawful strikes at the same time when their applications for certification were before the Board. The Board's decision in *Radio Lunch*, *supra*, makes it clear that recognition strikes are an improper way of acquiring bargaining rights:

"It goes without saying that the Board must at all times so administer the legislation so as to encourage compliance with its provisions. We cannot think of anything less likely to secure that result than to adopt a policy with respect to certification proceedings from which the inference might be drawn that aspirants to collective bargaining status may with impunity attempt to acquire that status by improper means and at the same time, on a less desirable but precautionary alternative, come before the Board as applicants for certification. . . ."

See as well the Board's decision in *Custom Aggregates*, [1978] OLRB Rep. March 215, in which the Board refused to allow certain persons to vote in a representation vote even though they were employed in the voting constituency at the time the vote was held.

18. Counsel for Local 183 contends that the conduct of Local 721 was more grievous than the conduct of the unions in *Radio Lunch* or *McAlpine*, *supra*, because it was the threat of picketing and its implications for Lormark and Folgor which created the basis for making the application for certification possible. Counsel argues that, had Folgor not been threatened, it is patently clear from its practice of using members of Local 183 for reinforcing

work that it would not have hired members of Local 721 and consequently Local 721 would have had no opportunity to apply for a certification.

19. In addition to the above cited cases, counsel for Folgor relies on the Board's recent decision in *Traugott Construction Limited*, [1981] OLRB Rep. Nov. 1680. Counsel asserts that the decision stands *inter-alia*, for the principle that the Board will decline to give effect to bargaining rights obtained as a consequence of unlawful conduct. This is a case in which the employer, *Traugott*, signed a voluntary recognition document with the Toronto Central Ontario Building and Construction Trades Council after picketing of its projects had caused an unlawful strike. When one of the council's constituent trade unions later attempted to rely on that document to establish its own bargaining rights, and therefore its right to refer a grievance to arbitration under section 124 of the Act, the Board held that it could not rely on that document because it was signed as a consequence of the council's unlawful acts. All of the cases cited above involved unlawful acts associated with attempts to obtain bargaining rights, three of which involved unlawful strikes and one a breach of the duty to bargain in good faith (*United Brotherhood*). In the case at hand, the threatened picketing did not materialize and nor did the unlawful strike which Folgor and Lormark apprehended. The facts leave no room for doubt that the threat of picketing was the direct cause for Folgor ordering the men from Local 721, which in turn paved the way for this application. The question for the Board to determine is whether in these circumstances, it should refuse to entertain the application, as counsel for Folgor and Local 183 contend.

20. Had the events transpired as Lormark and Folgor apprehended, in other words had the picketing on behalf of Local 721 been carried out with the result that any of the trades on the project had refused to cross the picket line, there is no doubt such actions would have constituted the violation of either or both sections 74 and 76 of the Act which are set out below:

74. No trade union or council of trade unions shall call or authorize or threaten to call or authorize an unlawful strike and no officer, official or agent of a trade union or council of trade unions shall counsel, procure, support or encourage an unlawful strike or threaten an unlawful strike.

76.(1) No person shall do any act if he knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike or an unlawful lock-out.

(2) Subsection (1) does not apply to any act done in connection with a lawful strike.

The problem for the Board is that these events did not occur and the Board is being asked to find that the threat of the picketing amounts to an unlawful act sufficiently grievous for the Board to refuse to entertain the application for certification.

21. In order to see whether the facts support such a finding, it is useful to review briefly the sequence of events revealed by the findings of fact:

- (a) on July 10th, Local 721 sought to have Folgor re-assign the reinforcing work from members of Local 183 to members of Local 721;
- (b) on July 15th, Local 721 approached Local 183 in an attempt to resolve the jurisdictional dispute;

- (c) on July 17th, the two foregoing attempts having failed, Local 721 filed the first jurisdictional complaint seeking to have the work re-assigned to its members and seeking to have the Board direct Folgor to sign a collective agreement binding upon it and Local 721;
- (d) on September 4th, the first jurisdictional dispute complaint was withdrawn and the second one filed, which was approximately the same time that the structural steel contractor began work on the project with an erection crew of Local 721 members;
- (e) approximately one week before the September 16th visit of Donaldson to the project, the steward for the ironworkers on the erection crew threatened Perrier, Lormark's superintendent, that the crew would walk off the job if Local 183's members were not replaced by members of Local 721 on the reinforcing work. That walk-out did not materialize, however; and
- (f) on the morning of September 16th, Donaldson visited the project and threatened Perrier with picketing if Local 183 members were not replaced with members of Local 721 on the reinforcing work.

The Board wishes to first make it clear that there is neither an iota of evidence nor any allegation that Local 721's conduct with respect to the attempts to settle the jurisdictional issue was anything but proper. The facts with respect to the above sequence of events, however, leave no doubt that Local 721 was claiming the reinforcing work which was being done by Folgor with members of Local 183 and that it was seeking to have Folgor bound together with Local 721 to a collective agreement, in other words to gain bargaining rights for Folgor's employees who do reinforcing steel work. Shortly after members of Local 721 began to work on the project, the steward for the ironworkers who was unquestionably an agent of Local 721, threatened a walk-out of the erection crew. The threat was not fulfilled, but approximately a week later Donaldson visited the project and raised the threat of it being picketed. The Board's own experience with unlawful strikes in the construction industry, as evidenced by its decisions in applications under section 135 of the Act, is that their visible cause in many instances is the presence of pickets at a construction site. The Board's experience is reflected by the common view of building trades unions, contractors and purchasers of construction, that it is a fact of life in the construction industry that the mere presence of pickets will frequently cause one or more of the unionized trades on a project to lay down the tools or to refuse to cross the picket line, regardless of the underlying problem.

22. In that particular context of the construction industry, Donaldson's threat to Perrier that the project would be picketed if Local 183 members were not replaced on the reinforcing work by Local 721 members, coming as it did shortly after the steward's threat of the walkout, may properly be seen to constitute the threat of an unlawful strike and, therefore, a violation of section 74 of the Act. Certainly Lormark and Folgor perceive the circumstances surrounding Donaldson's threat to be just that, the threat of an unlawful strike. The Board agrees with that perception and finds the Donaldson's threat of picketing the project following upon the earlier threat of the union steward constitutes a violation of section 74 of the Act.

23. The threat of picketing in every case will not be cause for the Board to find a

violation of the Act, but in the case at hand, withing the context of the sequence of events summarized in paragraph 21, we have the threat of picketing following upon an earlier threat that the ironworkers on the erection crew would walk off the job if Folgor did not substitute members of Local 721 for members of Local 183 on the reinforcing work. It is on these facts that the Board has concluded that there has been a threat of an unlawful strike. The fact that picketing will not always be cause for finding a violation of the Act is readily demonstrated in the Board's decision in *Maitland Redi-Mix*, *infra*, referred to in the dissent. In that case the Board found that the threat of picketing was not sufficient grounds to entitle the applicant to discretionary relief under either of section 82 or 123 (now section 94 and 135) of the Act. It is a decision which deals with whether the Board should exercise its descretion under either sections 94 or 135 to issue a declaration of an unlawful strike and cease and desist order by way of relief and, therefore, may be distinguished from this one which deals with an application for certification. Nonetheless it exemplifies some of the circumstances in which the Board will and will not relieve against picketing by contrasting the facts and conclusions of the Board in its decisions in *North Simcoe Electrical Contracting Limited*, [1973] OLRB Rep. June 336 and *Valentine Developments and Forto Forming Limited*, [1973] OLRB Rep. Oct. 537. In the former case, even though picketing occurred it had ceased by the time of the application and the Board, finding that no threat of an unlawful strike existed, declined to issue a direction. In the latter case, on the other hand, the Board granted relief against a threat of picketing because, on the facts, it found that the threat of picketing was the threat of an unlawful strike. At paragraph 11 of *Maitland Redi-Mix* the Board explains the distinction:

"The distinction between the *Valentine Developments* case, *supra*, and the *North Simcoe* case, *supra*, lies in the perception of the Board of what would probably happen in the former case as opposed to what had not happened in the *North Simcoe* case."

24. The Board finds it was that threat alone which compelled Folgor to request the men from Local 721. The fact that two men were at work for Folgor on September 21st, 1981, enabled the applicants to make the application and that opportunity derived directly from the unlawful conduct of officers or agents of Local 721, one of the applicants. In other words, but for the unlawful conduct of Local 721, the applicants would have had no basis on which to make this application. In these circumstances, the Board finds that the policy expressed in *Radio Lunch*, *Supra*, has application to the facts before the Board herein and, therefore, that the unlawful threat vitiates the employment relationship with the two members of Local 721 which it sought to impose on Folgor. For these reasons the Board finds that, for purposes of this application for certification, the two persons in question are not employees of Folgor under the Act. This being the case, on September 21st, 1981, when this application was made, the applicants had insufficient membership support to sustain the application. To conclude otherwise would be to make a mockery of the orderly and, for the construction industry, expedited procedures prescribed by the Act for obtaining bargaining rights.

25. In the result, this application is dismissed.

DECISION OF C. A. BALLENTINE, BOARD MEMBER;

1. I cannot agree that the evidence supports a finding that Mr. John Donaldson threatened a picket line, and thereby violated section 74, as the majority have found in paragraphs 14 and 22 of the decision.

2. The majority relies on the evidence of Mr. Perrier, the superintendent for the general contractor "Lormark". The evidence of Mr. Perrier was unclear and contradictory. In examination-in-chief by the respondent's counsel he could not identify who had made a threat of a picket line. However under cross-examination by counsel for Local #721, he stated that Donaldson talked about Ironworkers being hired to tie the rods, and he admitted Donaldson did not mention a picket line. On the other hand Mr. Donaldson's evidence was clear and unequivocal. He stated under cross-examination by both counsel for the respondent company and counsel for the intervener union Local #183 that at no time did he threaten a picket line or a strike. His evidence was consistent. I believe him. It just does not make sense that a person of his experience would make such a stupid threat of picketing, which has been attributed to him.

3. It is my opinion that, in any event, the Board cannot find a violation of section 74, even though the majority has found through circumstantial evidence that there was a threat of a picket line. No picket line was actually established at any time, nor was there a strike at the project. The *Labour Relations Act* does not refer to picket lines. Sections 74 and 135 refer to threatening an illegal strike, not threatening to picket, although I recognize that picketing might lead to an illegal strike. Nevertheless threatening to establish a picket line is not the same as threatening an unlawful strike and is not prohibited by the Act. The Board in *Maitland Redi-Mix Concrete Products Ltd.* [1980] OLRB Rep. Dec. 1751 recognized this when it stated at page 1755, para. 12,

"Statements by the respondents [trade union officials] that a picket line would be set up do not persuade the Board that an unlawful strike will occur at the site. The mere apprehension by the applicant that a picket line might be set up which in turn might lead to an unlawful strike is not sufficient, on the facts before the Board, to entitle the applicant to the granting of discretionary relief under either section 82 or section 123.

4. If an illegal strike had been threatened by the applicant union, either Lormark or Folgor could have made an application to the Board under section 135. This is the remedy that is open to an interested party when a strike is threatened or takes place. The Board has a practice dealing with such applications in a swift and efficient manner.

5. For the majority to conclude as they have, in this case, that an alleged threatened picket line constitutes a violation of section 74, without the protection of a formal application or complaint being filed and processed is prejudicial and unfair to the applicant union.

6. In my opinion the facts of this case clearly demonstrate that the respondent, at the relevant times had in its employ two persons who had been sent to work for it by the applicant. Therefore this case should not be dismissed at this stage.

1500-80-R United Food and Commercial Workers International Union, Local Unions 175 and 633, Applicant, v. The Great Atlantic & Pacific Company of Canada Limited, A & P Drug Mart limited, Respondents

Reconsideration – Related Employer – Practice and Procedure – Parties seeking clarification of effect of Board's previous declaration – When Board declaration of related employer becomes effective – Whether party may seek restriction on retroactive effect through reconsideration application

BEFORE: R.O. MacDowell, Vice-Chairman, and Board Members B. Armstrong and C.G. Bourne.

DECISION OF THE BOARD; March 16, 1982

1. This is an application under section 1(4) of the *Labour Relations Act*. Section 1(4) reads as follows:

“Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.”

2. By a decision dated March 27, 1981, (Reported at [1981] OLRB Rep. Mar. 285) the Board declared that The Great Atlantic & Pacific Company of Canada Limited, and A & P Drug Mart Limited, were one employer for the purposes of the Act. The applicant trade union now requests that the Board amplify or clarify its decision. In particular, the union seeks clarification about whether the declaration has retrospective effect. The respondents point out that this issue was not expressly addressed at the hearing (Although mention was made of certain grievances arising from the respondent's failure to apply the A & P collective agreement to the employees in the Drug Mart) and contend that the declaration should not be given retrospective effect.

3. The circumstances of this case were canvassed at some length in the reasons accompanying the Board's decision of March 27, 1981. The Board sees no reason why it should repeat that analysis here. It suffices to note that A & P Drug Mart Limited was created so that “A & P” could have a specialized pharmacy department in some of its larger stores. The Great Atlantic & Pacific Company of Canada Limited and A & P Drug Mart Limited have been under common control and direction since the inception of the latter.

4. In *JDS Investments Limited* [1981] OLRB Rep. March 294, the Board addressed the retrospective effect of a section 1(4) declaration as follows:

“At the hearing, the parties raised the issue as to whether a Board

declaration under section 1(4) can have effect prior to the time it was made, or whether it could be effective only in the future. We are satisfied that unless a Board declaration under section 1(4) is specifically stated to be otherwise, it has force and effect from the time the associated or related activities or business commenced, and does not operate only from the date of the actual Board declaration.”

There are good policy reasons why this should be the case; for otherwise, the mischief to which section 1(4) is directed would prevail until the union discovered the existence of the related corporate entity and had the matter litigated before this Board. In the meantime, the activities giving rise to employment normally regulated by the collective agreement would be beyond its scope — thereby placing upon the union and its members the full burden of delays in discovery and litigation.

5. Section 1(4) overrides the “corporate veil” and the notion of privity of contract, so that an employer which is party to a collective agreement cannot escape its obligations thereunder by carrying on related business activities through a separate corporate vehicle (See: *Norfolk Hospital* [1977] CLLC ¶14,094.) It would seriously undermine the remedial thrust of section 1(4) if, in the ordinary course, a declaration did not have the effect described by the Board in *JDS Investments Limited, supra*. Indeed, in the construction industry where physical plant and equipment are frequently not an important aspect of an employer’s economic organization, and economic activity can be readily channelled into a newly created corporate entity, the remedial effect of section 1(4) would be substantially impaired. Even in the instant case, the union did not discover for some time that what it thought was merely the drug department in the stores was, in fact, being run through a separate corporate entity. Nor did either of the respondents go out of its way to acquaint the union with this situation. It was not until the eve of an arbitration hearing, (well after the union had filed a grievance complaining about the failure to apply the agreement to the employees in the drug department) that the respondent raised the argument that the grievance was not arbitrable because the Drug Mart was a separate legal entity.

6. Section 1(4) is discretionary, and the Board is given a broad authority to “grant such relief, by way of declaration or otherwise, as it may deem appropriate”. That discretion could extend to a limitation on the retrospective effect of its declaration (see *Roy Brandon Construction* [1981] OLRB Rep. Feb. 219). The appropriate time to raise this issue however is at the hearing of the 1(4) application itself since the issue of remedy is linked to the merits of the section 1(4) proceeding and the exercise of the Board’s discretion.

7. In all of the circumstances of this case, the Board is not prepared to reopen and reconsider its section 1(4) declaration or limit its effect.

2350-81-R International Leather Goods, Plastic & Novelty Workers' Union, Local 8, Applicant, v. **Hardman Industries Limited**, Respondent, v. Group of Employees, Objectors

Certification – Membership Evidence – Person signing card five days after quitting employment – Card filed before terminal date – Whether Board attaching any weight to membership evidence

BEFORE: R. D. Howe, Vice-Chairman, and Board Members W. G. Donnelly and W. F. Rutherford.

APPEARANCES: *Martin Levinson and Alfred Sartorelli for the applicant; C. M. McKeon and Eric Hardman for the respondent; C. J. Abbass and Ian Sinclair for the objectors.*

DECISION OF THE BOARD; March 8, 1982

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. Having regard to the agreement of the parties, the Board finds that all employees of the respondent in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office staff, sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation periods, constitute a unit of employees of the respondent appropriate for collective bargaining.
4. There were 49 employees in the bargaining unit at the time the application was made. In support of this application, the applicant trade union filed documentary evidence of membership in the form of cards, each of which consists of a combination application for membership and an attached receipt. The applicant filed 35 such cards, 27 of which coincide with the names of employees in the bargaining unit at the time of the application. However, one of those cards was signed on February 21, 1982 by an individual who had quit her employment with the respondent on February 16, 1982. After hearing the submissions of the parties with respect to the weight, if any, that should be given to that card, the Board made the following oral ruling which is hereby confirmed:

“It has been the longstanding practice of this Board to give no weight to a membership card signed by an individual on or before the terminal date but after that person had been discharged for cause or quit his employment. The rationale for this rule is set forth as follows in *Amplifone Canada Ltd.*, [1976] OLRB Rep. Dec. 840, at paragraph 25:

‘...the Board, in inquiring as to whether there have been ‘separations’ of persons who were present on the date of making of the application, is influenced by the consideration that an employee who has completely severed his relationship with the employer, that is, has been discharged for cause or has quit, is so unlikely to have a

continuing interest in the affairs of the company or his fellow employees that a membership card signed by him, after such severance, cannot be given weight when assessing the true wishes of employees in the unit.'

Similar policy considerations preclude an individual who quits his employment or is discharged for cause prior to the date of a representation vote, from casting a ballot, notwithstanding the fact that he or she was employed in the bargaining unit on the date the vote was ordered (see *London District Crippled Children's Treatment Centre*, [1980] OLRB Rep. Apr. 461).

We are of the view that the Board's practice in these matters reflects sound labour relations policy considerations. Moreover, we are of the view that we ought not to lightly depart from a longstanding practice which provides guidance and an element of certainty for all of the parties which appear before the Board.

Accordingly, we are not prepared to give any weight to the card in question which, although it was filed with the Board on or before the terminal date, was not signed by the individual in question until five days after she had quit her employment with the respondent.

Accordingly, having regard to all of the evidence before us, the Board is satisfied that not less than forty-five per cent and not more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on February 23, 1982, the terminal date for this application and the date which the Board determines under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

In the alternative, if Mr. Levinson's contention is correct that the filing of the card in question on or before the terminal date results in more than fifty-five per cent of such employees being members of the applicant at the relevant time, we are nevertheless of the view that this is an appropriate case in which to exercise our discretion under section 7(2) of the Act to direct that a representation vote be taken."

5. In addition to the applicant's documentary evidence of membership, there was filed with the Board a petition purportedly signed by a number of employees in the bargaining unit in opposition to the application. The Board generally takes such petitions into account in deciding whether to exercise its discretion under section 7(2) of the Act to order a representation vote notwithstanding documentary evidence of membership which demonstrates that more than fifty-five per cent of the employees in the bargaining unit are "members" within the meaning of section 1(1)(1) of the Act. In this case, however, there will be a representation vote pursuant to section 7(2) in any event in view of the ruling set forth in the preceding paragraph. Accordingly, it was unnecessary to undertake the inquiry (into the origination of the petition and the manner in which each signature on the petition was obtained) contemplated by section 73 of the Board's Rules of Procedure.

6. The Board directs that a representation vote be taken of the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

7. The matter is referred to the Registrar.

1437-80-M Carpenters' District Council of Toronto and Vicinity, on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, Applicant, v. **Inducon Construction (Northern) Inc.**, Inducon Development Corporation, Inducon Construction of Canada Limited, Desbil Management Inc. and Inducon Design/Build Associates, Respondents

Abandonment – Construction Industry – Construction Industry Grievance – Related Employer – Whether companies bound by province-wide agreement – Whether related employers – Whether Board exercising discretion – Whether union abandoned bargaining rights – Board distinguishing *Hugh Murray* and *John Entwistle* decisions – Whether wishes of unrepresented employees of employer relevant consideration

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and M. Ross.

APPEARANCES: *Harold F. Caley and Fred Leach for the applicant; W. Michael Temple, R. T. Pettypiece and R. S. MacKay for Inducon Construction (Northern) Inc., S. C. Bernardo and Joe Watson for Inducon Development Corporation; no one for Inducon Construction of Canada Limited; J. Alexander Menzies for the employees of Inducon Construction (Northern) Inc., D. N. Corbett and R. E. McCormack for Desbil Management Inc. and Inducon Design/Build Associates.*

DECISION OF THE BOARD; March 11, 1982

1. The applicant has referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding determination. In its referral to the Board, the applicant has alleged that Inducon Construction of Canada Limited ("ICCL") has violated the Carpenters' provincial collective agreement. In particular, the applicant has alleged that ICCL violated Articles 4 and 19 and Schedule "A" of that collective agreement. The applicant referred to one project as the Honeywell Limited job on Gordon Baker Road in Willowdale and which involved concrete formwork. The applicant claimed, on its own behalf and on behalf of its members, compensation for all hours worked by non-members of the union on the project.

2. The initial hearing of this referral was held on October 23, 1980. On October 21,

1980, the Board received the following letter from the solicitors for Inducon Construction (Northern) Inc.:

We have been consulted by Inducon Construction (Northern) Inc. concerning your letter of October 14, 1980 addressed to Inducon Construction of Canada Limited which has been received in the mail.

We are advised that Inducon Construction of Canada Limited ceased to exist on or about August 31, 1977 as the result of an amalgamation, and that the officials of Inducon Construction (Northern) Inc. have no knowledge of any collective agreement having been entered into with the applicant. Our client is therefore not able to respond on behalf of the former company by way of filing a reply to the application nor is it able to forward any collective agreement to the Board.

We will be attending before the Board on Thursday, October 23rd to endeavour to obtain more particulars about this application and to request a copy of the collective agreement which is referred to in paragraph four of the Notice of Referral of the applicant. In the event that it is determined that the applicant intends to proceed with the application we will be requesting an adjournment in order that we may be properly instructed to prepare for any hearing to be held.

3. After the conclusion of the hearing on October 23, 1980, the Board received a letter from the applicant which stated that the applicant wished to have Inducon Development Corporation ("IDC") and Inducon Construction (Northern) Inc. ("ICNI") added as respondents. In addition, the applicant further advised the Board that it would be alleging that one of IDC or ICNI is the successor company of the initially named respondent ICCL and would be further arguing that all of the respondents are bound by the Carpenters' provincial collective agreements referred to in paragraph one by virtue of section 1(4) of the Act. The Board served notice of this referral and of hearing on ICCL, IDC and ICNI.

4. In March of 1981, replies to the referral were filed by IDC and ICNI. In its reply, IDC denied that any sale of business took place between it and any other company and denied that it is the successor of any other company and further denied that it carries on associated or related activities or businesses with ICCL and Inducon Construction (Northern) Limited or any other company, within the meaning of section 1(4) of the Act. IDC denied it was bound by the Carpenters' provincial collective agreement and further denied that the applicant or any other local of the United Brotherhood of Carpenters and Joiners of America, or the International has, or ever has had, bargaining rights for the employees of IDC and that if any such bargaining rights for the employees of IDC and that if any such bargaining rights were ever held that these bargaining rights have been abandoned. IDC further denied that the applicant or any local of the United Brotherhood of Carpenters and Joiners of America has, or ever has had, bargaining rights for the employees of ICCL, and that if any such bargaining rights were ever held that these bargaining rights have been abandoned.

5. In its reply, ICNI denied that it is a party to or bound to the applicant by the collective agreement referred to by the applicant. ICNI adopted the position that the applicant does not have and never has had any bargaining rights to represent its employees. ICNI also

denied that it had purchased a business or that it is the successor of any other company or that it has carried on associated or related activities or businesses with any other company within the meaning of the *Labour Relations Act*. In the alternative, ICNI stated that if by operation of law the applicant has had bargaining rights to represent its employees, such rights have been abandoned by the applicant.

6. During the hearing of this application the applicant made a motion that Desbil Management Inc. ("Desbil") and Inducon Design/ Build Associates ("IDBA") be made parties to this referral. In a decision in this matter dated June 15, 1981, the Board directed the Registrar to serve notice of the continuation of hearing of the referral to Desbil and IDBA. In a further decision dated June 30, 1981, the Board stated that it was prepared to add Desbil and IDBA as respondents upon this referral commencing from the beginning with full participation by Desbil and IDBA. The parties subsequently briefed counsel for Desbil and IDBA with the evidence and it was agreed that Robert MacKay again be called as a witness in order to permit counsel for Desbil and IDBA to question him. Counsel for Desbil and IDBA withdrew his objection to the jurisdiction of the Board and this reference proceeded to the conclusion of evidence and argument.

7. Before considering the issue of the existence of bargaining rights and the present relationship of the respondents, it is helpful to consider the evolution of the various companies within the Inducon group of companies. In 1968, ICCL and Inducon Consultants of Canada Limited were chartered as wholly owned subsidiaries of Inducon Holdings Limited ("IHL"). In December of 1976, IHL changed its name to IDC so that ICCL and Inducon Consultants of Canada Limited were wholly owned subsidiaries of IDC. In August of 1977, ICCL and three other companies were amalgamated with IDC. On December 29, 1978, ICNI was incorporated as a wholly owned subsidiary of IDC. On March 1, 1979, the direction and control of ICNI and Inducon Consultants of Canada Limited was assumed by IDBA. Desbil was incorporated on February 9, 1979, and entered into an equal relationship with IDC in IDBA.

8. In November of 1970, Local 1669 of the United Brotherhood of Carpenters and Joiners of America ("Local 1669") applied for certification with respect to certain employees of Inducon Consultants of Canada Limited and ICCL. For reasons which are not relevant to this referral, neither application was ultimately successful (see Board File Nos. 18661-70-R and 18796-70-R) and the Board dismissed and terminated, respectively, these two applications. On December 24, 1970, Local 1669 and ICCL signed a short form agreement which, in part, recited:

That the parties hereto accept and agree each with the other to be bound by all terms and conditions contained in the current Agreement between the Union and the Construction Association of Thunder Bay Incorporated, and as it may be changed or renewed from time to time by negotiations and/or by lapse of time, to the same extent as though the Contractor has executed such agreement as a member of the Construction Association of Thunder Bay Incorporated, and such terms and conditions are hereby made part of this agreement and effective on all projects of the contractor in the geographical District of Rainy River, Kenora, Thunder Bay and that part of the District of Algoma and Cochrane north of the 49th Parallel and west of the North Driftwood,

Abitibi and Mosse Rivers to the James Bay including the rivers herein named.

This agreement shall be effective on date of signing and shall remain in effect for a term of not less than one year and shall continue automatically thereafter for annual periods of one year each unless either party notifies the other in writing not less than ninety (90) days prior to the expiration date that it desires to change, add to, or amend this Agreement.

9. The collective agreement between Local 1669 and The Construction Association of Thunder Bay Incorporated ("Association") was made on June 1, 1970, and remained in effect until April 30, 1973. Article 24.02 of the collective agreement between Local 1669 and the Association provides:

Should the Association or the Union desire to change, add to, or amend this Agreement, notice in writing of such intent shall be made not later than ninety (90) days prior to termination of Agreement, and all changes are to be specified at this time.

The Parties agree to meet not later than ten (10) days following the date that notification of changes, additions, or amendments are to be received as herein mentioned.

If no such notice is given, this Agreement is to continue in force from year to year, subject to ninety (90) days' notice in writing, prior to April 30th of each year.

Articles 3.01 and 1.05 of this collective agreement provide:

3.01 The employer recognized the Union as the sole collective bargaining agent for all Employees as defined in Article 1, Section 1.05 of this Collective Agreement in his employ in the geographical districts of Rainy River, Kenora (including the Patricia Portion), Thunder Bay and that part of the Districts of Algoma and Cochrane, north of the 49th parallel and west of the North Driftwood, Abitibi and Moose Rivers to James Bay including the Rivers herein named.

1.05 "Employee" or "Employees" means any foreman, working foreman, lead hand, journeyman or apprentice in the employ of the Employer and engaged in work covered by this Collective Agreement.

10. ICCL was engaged in the construction of three schools in Rainy River and Fort Frances which are located within the geographic area referred to in paragraphs eight and nine. Members of Local 1669 were employed on these three schools and the collective agreement between ICCL and Local 1669 was applied to these jobs. Local 1669 filed grievances with respect to these jobs and such grievances were settled prior to arbitration. The work on these jobs was concluded by the end of 1973 or the early part of 1974. After the completion of the last of these three jobs, ICCL did not subsequently engage in construction work in the geographic area referred to in paragraphs eight and nine.

11. In a letter dated February 27, 1973, ICCL wrote to Local 1669 enclosing a copy of a letter it had sent to its own solicitors on the same date advising that it would not be renegotiating or re-entering into a new collective agreement upon the expiration of the then current collective agreement either separately or as a part of the Association. In a letter of the same date the Association was also advised of this position of ICCL. In a letter dated March 2, 1973, Local 1669 advised ICCL that it had no wish to terminate its agreement with ICCL. Local 1669 did not serve notice to bargain on ICCL in 1973 or 1975. Similarly, Local 1669 did not apply for the appointment of a conciliation officer with respect to ICCL. The Association filed an application for accreditation on May 15, 1973, and in that application Local 1669, as the respondent, named ICCL as an employer for whom Local 1669 was entitled to bargain as of May 15, 1973. The Association requested leave to withdraw its application and the Board dismissed the application on October 16, 1973. (See Board File No. 3814-73-R.) In March of 1978, Local 1669 wrote to ICCL by registered mail as follows:

Please be advised that the agreement that we now hold with your Company will cease to operate on the 30th April 1978.

We are negotiating a Provincial Agreement for the Industrial Commercial and Institutional Sectors which may affect your Company.

We will also be negotiating an agreement with the Construction Association of Thunder Bay for the Residential Sector.

As soon as the guidelines are set, we may have to negotiate separately with your Company for a new agreement. We will contact you at a later date to arrange a mutually acceptable time and date to meet if necessary.

There was no evidence before the Board that either Local 1669 or ICCL followed up on the letter of March, 1978. The next contact with ICCL was a letter dated July 18, 1980, from Philip Robichaud, the acting business manager of the applicant, which stated:

We understand that the United Brotherhood of Carpenters and Joiners of America, Local 1669 holds bargaining rights for carpenters and carpenters' apprentices employed by your company in their geographic area. Pursuant to Bill 204, and Act amending the Labour Relations Act effective May 1st, 1980, we believe your company is bound by the provincial collective agreement with the Carpenters' Union, province, and in particular, Board area #8.

We are enclosing a copy of the Provincial collective agreement which expired on April 30, 1980. As you are probably aware, a new collective agreement has been entered into and as soon as copies are available, we will forward a copy to you.

We expect you to comply with the collective agreement. If you have any questions concerning this matter, please contact me.

ICCL did not respond to this letter.

12. It was argued by the respondents that whatever bargaining rights had been held by Local 1669 with respect to ICCL had been abandoned by the lack of action by Local 1669, and that there were no bargaining rights which would form the basis of a finding that Local 1669's bargaining rights were included in the provincial agreement which came into effect in 1978. It followed from the position of the respondents that there would be no basis for applying the provisions of section 137(2) with a deemed recognition of the applicant in its geographic jurisdiction by any of the respondents. It was the position of the applicant that Local 1669 had not abandoned its bargaining rights.

13. While ICCL did not give Local 1669 notice in accordance with either the short form agreement or the collective agreement between the Association and Local 1669, the notice in the letter dated February 27, 1973, falls within the notice requirements set forth in section 53(1). However, the letter dated February 27, 1973, did not have the effect of terminating the bargaining rights of Local 1669. There was no longer a collective agreement which was binding on ICCL after April 30, 1973, which covered the balance of its work until its completion early in 1974. Whether a trade union has abandoned its bargaining rights is a matter which must be assessed on the facts of each case. ICCL had its base of operations in southern Ontario and since the completion of its jobs in Rainy River and Fort Frances in 1974, it has not undertaken any construction work within the geographic jurisdiction of Local 1669. ICCL may be described as a non-resident contractor with respect to Local 1669 and it is readily appreciated that Local 1669 has more immediate concerns with contractors, whether resident or non-resident, who either regularly or actually work within its geographic jurisdiction. In *Dravo of Canada Limited*, [1977] OLRB Rep. Sept. 568, 572, the Board considered a case where there was a similar lack of employees and stated:

Where there has been an absence of employees (as is not uncommon in the construction industry) who would be covered by successive collective agreements, the lack of contact by the bargaining agent with the employer during the period of such absence would not support a finding of abandonment of bargaining rights by the trade union. In this regard see the *Dominion Bridge Company Limited Mount Dennis Plant* case, [1971] OLRB Rep. April, 201, 204.

While it is expected that a trade union will actively promote its bargaining rights, in the instant case, there was only a period of some eight to ten months when Local 1669 did not actively pursue its bargaining rights before ICCL moved out of its geographic jurisdiction — never to return. Reference was made to two recent cases of the Board, namely, *Hugh Murray Limited*, [1979] OLRB Rep. July 664 and *John Entwistle Construction Limited*, [1979] OLRB Rep. Nov. 1096, (applications for judicial review dismissed) where the Board held that two trade unions had abandoned their bargaining rights. The facts in these two cases are quite different from the instant referral. In the latter case, the company was active in the geographic jurisdiction of the trade union throughout the period when the trade union had not actively promoted its bargaining rights. In the former case, the trade union was aware of the employer and for reasons of its own chose not to serve notice to bargain on the employer and at all times acted as though it did not have bargaining rights for the company's employees. In the instant referral Local 1669, with the exception of some eight to ten months in 1973 and 1974, has not failed to represent employees in the bargaining unit when there were employees to represent. A trade union is not required to perform academic exercises with an employer in the construction industry in order to represent non-existent employees. On the facts of this

referral, the Board is not prepared to find that Local 1669 has voluntarily abandoned its bargaining rights with respect to carpenters and carpenters' apprentices employed by ICCL in the geographic area referred to in paragraphs eight and nine.

14. Robert MacKay gave evidence that he is employed and paid by IDBA and holds the position of president. He is also a director of IDC. In 1968 he was employed by IHL and believes he was vice-president at one time. An extract from the share register of IHL indicated that Mr. MacKay and Andrew Zsolt became directors as of December 31, 1974, and that on the same date Mr. Zsolt was elected president executive, Mr. MacKay was elected vice-president and J. O'Connell was also elected vice-president. There were apparently changes being made from time to time in IHL and the Board of Directors on January 6, 1969, included Mr. Zsolt, Mr. MacKay, Mr. O'Connell and Kalman Czegledy. In addition, the election of officers as of January 6, 1969, comprised Mr. Zsolt as president with Mr. MacKay, Mr. O'Connell and Mr. Czegledy as vice-presidents and J. Leach as secretary-treasurer. William Buck was appointed a director on October 15, 1970. On October 23, 1973, Mr. MacKay was appointed executive vice-president and Mr. O'Connell was appointed vice-president.

15. On December 27, 1968, Mr. Zsolt, Mr. MacKay and Mr. O'Connell became directors of Inducon Consultants of Canada Limited and on May 22, 1970, Mr. Czegledy and Mr. Buck also became directors. With respect to the officers, Mr. Zsolt became president on December 27, 1968, and held that position until June 5, 1975. Mr. Zsolt became chairman of the board on June 5, 1975. Mr. MacKay was a vice-president from December 27, 1968, until May 25, 1976 and on May 25, 1976, he became vice-chairman of the board. Previously, Mr. MacKay had been secretary-treasurer from October 12, 1972, until December 11, 1972, and secretary from December 11, 1972, until December 31, 1974. On March 1, 1979, Mr. O'Connell resigned as a director and as a vice-president. On March 1, 1979 Mr. MacKay resigned as a vice-president and was appointed president. On March 5, 1979, Mr. MacKay resigned as president and was appointed vice-chairman and secretary. On March 1, 1979, Mr. Buck and Mr. Czegledy were appointed as vice-president and secretary and vice-president and treasurer respectively. On March 5, 1979, Mr. Buck resigned as a vice-president (and also presumably as secretary) and Mr. Czegledy resigned as a vice-president and treasurer. On that same date Mr. Buck was appointed president and Mr. Czegledy was appointed a vice-president.

16. Mr. Zsolt, Mr. MacKay and Mr. O'Connell became directors of ICCL on May 24, 1968, and Mr. Buck and Mr. Czegledy became directors on September 8, 1971. Mr. Zsolt was elected president on May 24, 1968, and resigned from that office on May 25, 1976. On May 25, 1976, Mr. Zsolt was elected chairman of the board of ICCL. Mr. MacKay was elected a vice-president on May 24, 1968, and resigned from that office on May 25, 1976. Mr. MacKay was elected secretary-treasurer on October 12, 1972, and resigned from that office on December 11, 1972. Mr. MacKay was elected secretary on December 11, 1972, and resigned from that office on January 4, 1974. On May 25, 1976, Mr. MacKay was elected president of ICCL. Mr. Buck and Mr. Czegledy were elected vice-presidents of ICCL on January 4, 1974.

17. The major and controlling shareholder of IHL from 1968 to 1976 or 1977 was Andrew Zsolt with about eighty-five per cent of the issued shares. The remaining fifteen per cent was held among more than twenty persons with four or five senior employees holding most of the fifteen per cent. From 1968 until 1976 Inducon Consultants of Canada Limited was functioning as a consulting engineering firm with the bulk of its activities involving the

designing of construction projects and with some consulting activities for outside clients. More than sixty per cent of the work of Inducon Consultants of Canada Limited was "in house" work. The philosophy of the Inducon group is to combine engineering in a contract and to have Inducon Consultants of Canada Limited perform the engineering work. With very few exceptions, Inducon Consultants of Canada Limited performed all of the engineering work for ICCL. Design-built contracts would be signed by ICCL with the engineering portion being performed by Inducon Consultants of Canada Limited.

18. There were individuals whose primary work was for Inducon Consultants of Canada Limited and there were managers whose work was for ICCL. These two groups would overlap in the area of marketing where both engineering and construction services were being offered. IHL, ICCL and Inducon Consultants of Canada Limited were based in Toronto during the period between 1968 and 1976. The Inducon group of companies entered the construction field in northwestern Ontario with the design and construction of schools after it had gained some success with schools in Whitby. In 1969, Inducon Construction Western Limited was incorporated with an office in Winnipeg. It was difficult to supervise the construction of the schools in Rainy River and Fort Frances from Toronto and the supervision for this construction was from the office in Winnipeg.

19. In 1970, ICCL employed between eight and ten carpenters outside northwestern Ontario and in 1971 there were fourteen jobs in progress and an annual billing of about seven and a half million dollars. All of the new projects in 1971 were in Toronto with the exception of one project in Owen Sound and between eight and ten carpenters were employed in Toronto. By 1972 there were fourteen projects of which thirteen were in Toronto with the remaining project in Fort Frances. The annual billing increased from six million dollars in 1972 to almost twenty million dollars in 1978. Between 1973 and 1979 most of Inducon's jobs were in Toronto with the balance in southern Ontario. Between 1972 and 1976, ICCL employed between eight and sixteen carpenters in southern Ontario. As of 1980, ICNI employed about fifteen carpenters. Prior to the amalgamation, ICCL endeavoured to provide continuous employment for its carpenters. The same policy was adhered to after amalgamation and ICNI also follows this policy. Before 1970, and up until the change in name in 1976, IHL never acted as a builder. During this period, IHL acted as a developer in the area of greater Toronto. From December of 1976 until August of 1977, IDC did not act as a builder but did act as a developer in the area of greater Toronto. At the time of the amalgamation in 1977, contracts were signed by ICCL as a division of IDC. At this time, ICCL, as a division of IDC, continued to work with Inducon Consultants of Canada Limited in the same relationship. IDC employed the carpenters and after amalgamation IDC continued to act as a development company. Mr. MacKay gave evidence that the amalgamation occurred essentially for tax reasons and that no consideration was given to the labour relations aspect of the change.

20. Mr. MacKay, Mr. Zsolt and Mr. Buck became directors of ICNI on December 29, 1978. On March 2, 1979, Mr. Zsolt ceased to be a director and on that date Mr. Czegledy became a director. Mr. MacKay was elected president on December 29, 1978, and resigned on March 2, 1979. On the latter date, Mr. MacKay was elected president and resigned on March 5, 1979, when he was elected vice-president and secretary. Mr. Buck was elected secretary on December 29, 1978, and resigned on March 2, 1979. On that date, Mr. Buck was elected vice-president and secretary and on March 5, 1979, he resigned from these positions. On March 5, 1979, Mr. Buck was elected vice-president. On March 2, 1979, Mr. Czegledy was elected vice-president and treasurer. On March 5, 1979, he resigned from these positions. On March 5, 1979, Mr. Czegledy was elected president.

21. Mr. MacKay informed the Board that ICNI was incorporated on December 29, 1978, in anticipation of a partnership for which a construction vehicle would be needed. ICNI performed construction from the time of its incorporation until March 1, 1979, with the on-site supervision and office management being performed by the superintendent and the office manager who previously worked for ICCL and for ICCL as a division of IDC.

22. Desbil was incorporated on February 9, 1979, and the first directors were Mr. MacKay, Mr. Czegledy and Mr. Buck and they hold the offices of president, vice-president and treasurer, and vice-president and secretary, respectively. The shareholders of Desbil consist of these three persons and John O'Connell and James Ross, who are also directors. In addition, five department heads and department managers are shareholders and ten other associates, for example, project managers. It was the intention either that all the design and development work would be taken away from IDC and given to the partnership or that IDC would donate the design and development work to the partnership as its contribution to the partnership. Of the fifteen shareholders of Desbil, about a half of them hold shares in IDC. However, one of the conditions agreed to on forming the partnership was the surrender of shares in IDC in exchange for the contribution to the partnership.

23. In brief, IDC contributed the design/build and development work to the partnership and Desbil contributed money and those shares of IDC which had to be surrendered to IDC. It was agreed that Desbil would be the managing partner and would exercise this function through an executive committee. Mr. MacKay chairs this committee. The members of the executive committee nominate directors and officers for ICNI. The persons who make management decisions for ICNI and Inducon Consultants of Canada Limited are principals and agents of Desbil.

24. The partnership agreement was made as of March 1, 1979, and is between IDC of the first part, Desbil of the second part, and W. P. Buck Investments Inc., K.C.N. Consultants Limited and Sarito Company Limited. The last three companies are the personal companies of Mr. Buck, Mr. Czegledy and Mr. MacKay. The agreement recites that Desbil has been incorporated for the primary purpose of forming a partnership together with IDC to carry on the construction and engineering business previously carried on by IDC. In a further recital it is set forth that IDC has agreed to transfer to the partnership all of the assets and goodwill of its existing design/build business and that Desbil has agreed to transfer certain additional capital to the partnership. The partnership leases space from IDC at 235 Yorkland Boulevard in Willowdale. The partnership is presently engaged in the designing and construction of buildings under contract for third parties and the designing and construction of buildings for IDC on a fee basis. Since the partnership has been established, IDC has not operated as a builder or a consultant. IDC continues to act as a developer and operates properties and office buildings. In paragraphs 32 and 33 of the partnership agreement, IDC granted to the partnership for a period of ten years the first opportunity to provide design/build services whenever such services are required by IDC. In addition, IDC covenanted not to undertake any design/build services for third parties. On the other hand, Desbil covenanted that it would not carry on any land development, land assembly or leaseback business and the partners agreed that the partnership would only undertake design/build projects contracted for with third parties or with IDC unless otherwise determined by the partners. Mr. MacKay informed the Board that it was the intention of the parties to the partnership agreement that the activities of IDC and the partnership be kept separate. Commencing in 1984, Desbil has the right to acquire IDC to sell to Desbil up to one-half of IDC's present fifty per cent interest in

the partnership. In addition, Desbil has agreed under the partnership agreement to purchase an aggregate of one-half of IDC's present fifty per cent interest in the partnership on or before June 1, 1989. In the event that Desbil purchases an aggregate of one-half of IDC's fifty per cent interest in the partnership, then Desbil is entitled to purchase all of the remaining interest of IDC in the partnership upon the happening of certain events.

25. In an asset sale agreement made as of March 1, 1979, the contribution of IDC to the partnership is set forth. The agreement states that all of IDC's construction and engineering business, including the goodwill associated with that business, are contributed to the partnership. The value placed on this contribution was \$233,168. The agreement also sets forth that the fair market value of property transferred from IDC to the partnership was \$983,168. Such property included furniture, fixtures, tools, equipment, goodwill, shares in ICNI and Inducon Consultants of Canada Limited.

26. Since the formation of the partnership, ICNI has signed the construction contracts. Mr. MacKay described Desbil as a holding company which holds its share of the partnership and has no assets other than the partnership. The three personal companies, namely, W. P. Buck Investments Inc., K.C.N. Consultants Limited and Sarito Company Limited, hold the shares in Desbil as the principal shareholders. While Desbil does not engage directly in construction, its objects are broad enough to permit it to engage in the businesses of construction and engineering. There was some confusion in the mind of Mr. MacKay about the identity of the employer of carpenters and labourers who are employed to perform the construction. Initially, it was his position that ICNI never had any employees and the carpenters and labourers were employed and paid by the partnership. Subsequently, Mr. MacKay informed the Board that the carpenters, labourers and superintendents are employed by ICNI but are paid by cheques which bear the name of the partnership. He explained that this arrangement was because of the fact that neither ICNI nor Inducon Consultants of Canada Limited have bank accounts. Mr. MacKay explained that these cheques are computer cheques which utilize the computer owned by IDC. A bank runs the payroll and the general ledger and various accounts of the partnership are on the computer. T-4 slips from Revenue Canada indicate that during 1979 the carpenters were employed by IDC and Inducon Design Build *Associate* (emphasis added). Employee Joe Vital worked for IDC and Inducon Design Build *Associate* during 1979. The T-4 slips from Revenue Canada for 1980 indicate that Inducon Design Build *Associate* was the employer of the carpenters. Record of Employment statements for Unemployment Insurance Canada were prepared for the carpenters which indicated that IDC was the employer. However, these statements were never issued to the carpenters. Subsequently, the carpenters completed personal data sheets in applying for employment with ICNI. The partnership utilizes the computer and may be running the accounts for ICNI and Inducon Consultants of Canada Limited. The signs which are displayed on construction projects depend upon the marketing ideas being used with a particular project. The signs which may be used have displayed "Inducon", "Inducon Construction", "Inducon Construction Northern" or "Inducon Design/ Build Contractors". Management functions are provided by the partnership and the managers receive salaries from the partnership. One of the managers, who works for the partnership, is responsible for hiring carpenters.

27. Edwin Ribeiro gave evidence that he joined the Inducon group of companies in or about 1968. With the exception of a period of three years he has worked for the Inducon group of companies from 1968 until the present. He related his unhappy experiences when he was a

member of a Carpenters' local trade union. Mr. Ribeiro expressed opposition to having the applicant represent him or his fellow employees who are carpenters in collective bargaining and stated that the carpenters were "not in favour of Inducon joining the union". Mr. Ribeiro identified a petition and the signatures of fifteen carpenters on the petition. The heading on the petition stated:

We the undersigned being all employees of the said company, Inducon Construction (Northern) Inc. are firmly opposed to membership in a carpenters' union and more particularly the union represented by the Carpenters' District Council of Toronto and Vicinity, on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America.

Mr. Ribeiro collected the signatures during working hours and informed his superintendent what he was doing and was paid for a full day on the day when he visited ten to twelve job sites to obtain the signatures on the petition. In cross-examination, Mr. Ribeiro said that he did not know exactly which Inducon company he worked for and that "to me it's all the same people to me. I don't understand the difference".

28. The Inducon group of companies is generally presided over by Andrew Zsolt. As the Inducon group of companies has proved to be successful over the years, a variety of arrangements have been put into effect to accomplish the expansion and success of the group. The most recent corporate metamorphosis of the Inducon group of companies has involved the formation of Desbil as a vehicle for permitting valued employees to participate in the present and the anticipated future success of the Inducon group of companies.

29. IDC, ICNI, IDBA, and Inducon Consultants of Canada Limited make up the totality of the business operations of the Inducon group. ICNI is in some respects the alter ego of IDBA in that by having the commercial contracts in the name of ICNI, the partnership obtains the benefits of limited liability and ease of bonding and financing. The construction and engineering and the design/build business, the name of Inducon, the premises, the employees, the assets and the goodwill have been preserved and transferred to IDBA. A core group of carpenters, labourers and site managers have been successively employed by ICCL, IDC and IDBA and/or ICNI. In the formation of the partnership, it should be remembered that IDC has donated the design/build business as its contribution to the partnership. the partnership now not only performs design/build business for third parties, but also for IDC on a fee basis. The evidence of Mr. MacKay and Mr. Ribeiro is of significance with respect to the employment relationship. In the case of Mr. Ribiero, he was not sure and really did not care who was similarly unsure as to who was the employer of the carpenters and labourers. Notwithstanding the change in the testimony of Mr. MacKay, the T-4 slips indicate IDBA as an employer. The partnership operates and manages ICNI, and the managers and operators for the partnership are employees of the partnership. The general manager and the individual who hires the carpenters is also an employee of the partnership. After the incorporation of ICNI in December of 1978, the employees continued to be paid by IDC. IDC had some projects that it was engaged in and was required to finish off. ICNI signed up the new business and the same work force was utilized to perform both the finishing off of the previous projects and the new construction. The management to complete these projects for IDC was provided by the partnership.

30. In *Walters Lithographing Company Limited*, [1971] OLRB Rep. July 406, the

Board set forth criteria with respect to section 1(4) of the Act. These criteria are (1) common ownership or financial control, (2) common management, (3) interrelationship of operations, (4) representation to the public as a single integrated enterprise, and (5) centralized control of labour relations. The Board now considers these criteria in relation to IDBA, ICNI, Inducon Consultants of Canada Limited, IDC and Desbil.

31. IDBA, ICNI, Inducon Consultants of Canada Limited, IDC and Desbil were formally all located at 250 Consumers Road in a building owned by IDC. Subsequently, they all moved to 235 Yorkland Boulevard in Willowdale, which is another IDC building. These companies occupy the eleventh and twelfth floors of the premises. All of the companies use the computer of IDC and all of the companies use payroll systems at the same bank, with the exception of Desbil. All of the companies have the same solicitors with the exception of Desbil. All of the companies have the same telephone number, and the calls are answered by the same individual who is employed by IDBA and located on the eleventh floor. The signs at the various projects may indicate IDBA, Inducon or ICNI, and are interchangeable depending upon the marketing concept which is being used on a specific job. The carpenters and labourers were transferred either to ICNI or IDBA and the salaried personnel were transferred to the partnership. The persons who secure the construction contracts and the estimators who prepare the bids for such contracts are employed by IDBA. The tools and equipment, which were formally owned by IDC, were transferred to ICNI. Counsel for IDC informed the Board that the technical requirements of section 1(4) have been satisfied with respect to ICCL and IHL, and also with respect to IDC and ICNI.

32. There is present in the arrangement between IDC and ICNI, common ownership and financial control. The same core group of project managers worked for both companies, and there was an interrelationship of operations with employees performing work for both companies and continuing on the same payroll. There was a representation to the public as a single integrated enterprise, and it is quite clear the Inducon was the important name. These companies occupy the same head office and, in the Board's opinion, there was a centralized control of labour relations with all employees being paid on payroll of IDC and supervised by the same personnel. By virtue of the bargaining rights held by Local 1669 with ICCL, IDC upon amalgamation, and subsequently ICNI became parties to those bargaining rights. At the time, the provincial agreement was in effect but those bargaining rights would apply to those companies only in the geographic area of Local 1669, which has been referred to earlier in this decision. On March 1, 1979, the design/build business, including the shares which were exchanged, were sold to the IDBA. This comprised IDC and Desbil as equal partners in IDBA. The partnership commenced its business and the design/build business was sold to it by IDC. Projects which were started by ICNI prior to March of 1979, were completed for IDC by the partnership and some of the projects which were in the process of being performed by ICNI were completed for the partnership. The construction assets of IDC were transferred to ICNI through the partnership.

33. With respect to IDC and IDBA, it is noted that IDBA commenced work during the period of the first provincial agreement which was in effect from September 6, 1978 to April 13, 1980. The assets of the partnership, for example, furniture and fixtures, were previously owned by IDC and were utilized by the same group of employees in the design/build business. The same equipment and tools which were formally owned and used by IDC were used on the new projects. The goodwill associated with the design/build business was transferred from IDC to IDBA and in return there was the payment of two hundred and fifty thousand dollars

for this consideration. IDC received a fifty per cent interest in the partnership and the other consideration was that Mr. MacKay, Mr. Buck and Mr. Czegledy had to return their shares in IDC. In effect, the whole of the design/build business of IDC had therefore been sold to IDBA. For its part, IDC obtained cash and a fifty per cent interest, together with the return of its shares and this had the effect of securing the continuation of the design/build business by the same employees who had looked after the business of IDC.

34. The application of the provisions of section 1(4) of the Act to ICNI and IDBA is most appropriate. Mr. MacKay and Mr. Ribeiro, as referred to previously, were unsure of the employment relationships surrounding these two companies. In addition, there is also the documentary evidence which indicates that the partnership was the employer of the carpenters. There was the representation to the public as a single integrated enterprise by the use of the name Inducon, the use of common premises, together with a measure of common ownership and financial control. In addition, there is the fact that ICNI was owned by the partnership.

35. With respect to IDC and Desbil, it was strongly argued by the applicant that Desbil under its articles is able to engage directly in construction and engineering work. As referred to earlier, Desbil is a holding company and is not an active company in that it has no employees. It is the only entity which does not use the word Inducon in its name and while its articles give it the capability to do construction and engineering work it should not be forgotten that for the sum of fifty dollars anyone in this Province can have that right inserted into the articles of a corporation. In effect, such a capability does not mean a great deal in Ontario today. This is not a matter of any great consequence because a company's articles can always be amended. The Board looks to the reality of the situation in the circumstances of this application rather than to the capabilities which may or may not be exercised. In this case, the capabilities for performing construction and engineering work have not been exercised.

36. In applying the criteria referred to in *Walters Lithographing Company Limited*, *supra*, and having regard to the kaleidoscope of common management, the periodic pairings of common ownership or financial control, the interrelationship of operations, the representation to the public as a single integrated enterprise during the evolution of the Inducon group of companies together with the centralized control of labour relations for much of that time, the Board finds that IDC, IDBA and ICNI have carried on associated or related activities or businesses under common control or direction within the meaning of section 1(4) of the Act. In applying the provisions of section 1(4), it is not necessary that the related activities or businesses are carried on simultaneously. For an example, see *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945. In the exercise of its discretion under section 1(4), the Board treats IDC, IDBA and ICNI as constituting one employer for the purpose of the Act.

37. In *Crown Cork and Seal Company Limited*, [1978] OLRB Rep. Sept. 809, the Board reasoned that there ought to be a labour relations purpose in the exercise of the Board's jurisdiction under section 1(4). In the case of Desbil, the Board notes that it never had any employees, is a holding company which holds its share of the partnership and has no other assets. In the view of the Board, there is no labour relations purpose to be served at this time in applying the provisions of section 1(4) to Desbil. Accordingly, the Board, in the exercise of its discretion, it not prepared to treat Desbil as constituting one employer with IDC, IDBA and ICNI for the purposes of the Act. The applicant did not request any relief with respect to Inducon Consultants of Canada Limited and there was no evidence before the Board that this

company ever employed carpenters or labourers on any construction project. While the aspects of common management, common ownership or financial control, interrelationship of operation and representation to the public as a single integrated enterprise apply to the relationship between this company and IDC, IDBA and ICNI, in the opinion of the Board, no labour relations purpose would be served at this time in applying the provisions of section 1(4) to Inducon Consultants of Canada Limited. Accordingly, the Board, in the exercise of its discretion, is not prepared to treat Inducon Consultants of Canada Limited as constituting one employer with IDC, IDBA and ICNI.

38. The Board finds that Local 1669 possessed bargaining rights for IDC upon the amalgamation of ICCL to form IDC. And that upon the incorporation of ICNI in 1978 as a wholly owned subsidiary of IDC, the bargaining rights continued to ICNI, and that from there the bargaining rights flowed to IDBA upon the application by the Board pursuant to its discretion under section 1(4). Upon the execution of the first provincial collective agreement between the employer bargaining agency and the employee bargaining agency in 1978, IDC, IDBA, and ICNI became bound by that agreement, and, by virtue of the operation of section 137(2), there is a deemed recognition by IDC, IDBA and ICNI of the applicant which is an affiliated bargaining agent of the designated employee bargaining agency. Therefore, these companies are deemed to have recognized the applicant as the bargaining agent in the geographic jurisdiction of the applicant in respect of employees of the employer employed in the industrial, commercial and institutional sector of the construction industry.

39. The employees and the respondents object to a declaration issuing to the applicant which would have the effect of making the applicant or one of its locals the bargaining agent with their employer or employers. In enacting section 137(2) of the Act, the Legislature made no reference to any consideration to be given to the unrepresented employees of the employer when the deemed recognition comes into effect. The applicant has not indicated what will be its attitude towards these employees. The petition, which was filed before the Board, would not have persuaded the Board, had this been an application for certification, to lend any weight to the objections of the employees. Quite clearly, there was too much knowledge and participation and assistance by the supervisory staff of the employees for the Board to give any weight to such a document. On the one hand, the applicant may offer membership to the employees and, on the other hand, it may require their dismissal pursuant to a union security clause in the current provincial collective agreement. Clearly, it is open to the applicant under union security provisions of the current provincial collective agreement to require the employees to be or become members in good standing of the United Brotherhood of Carpenters and Joiners of America.

40. The Board notes the agreement of the parties that the applicant will not be requesting damages from any of the respondents with respect to any violations of the current provincial agreement with respect to work until three days after the date which appears on this decision. The Board remains seized with this reference, pending a resolution of the issue of damages between the parties.

2289-81-R Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **Leon's Furniture Limited**, Respondent, v. Group of Employees, Objectors.

Certification – Membership Evidence – Petition – Whether full-time organizer made “\$5 now or \$50 later” statement in soliciting membership – Effect where such statement made considered – Whether confusion among employees causing Board to direct vote – Whether counter-petition voluntary – Effect where petition and counter-petition both voluntary

BEFORE: George W. Adams, Q.C., Chairman, and Board Members J. A. Ronson and F. S. Cooke.

APPEARANCES: *Ken Petryshen and Jim O'Donnell for the applicant; Roy C. Filion, George Leon and Greg Leon for the respondent; and Ken A. McCallum and Robert Hendriksen for the objectors.*

DECISION OF GEORGE W. ADAMS, Q.C., and F.S. COOKE; March 10, 1982

1. This is an application for certification.
2. The Board finds the applicant to be a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. Having regard to the agreement of the parties the Board is satisfied that all employees of the respondent working in Burlington, Ontario save and except supervisors, those above the rank of supervisor, office and sales staff, those regularly employed for not more than twenty-four hours per week and students employed during the school vacation period constitute a unit of employees appropriate for collective bargaining.
4. This matter involves charges by the respondent employer pertaining to the validity of the membership evidence filed by the applicant; charges by the applicant with respect to the employer's conduct in relation to a relevant petition; and a relevant counter-petition. The Board heard evidence with respect to the respondent's charges and, in order to expedite the hearing, the parties agreed that the petition was a voluntary expression of employee wishes permitting the Board to focus only on the voluntariness of the overlapping counter-petition.
5. The evidence establishes that Mr. Jim O'Donnell, a full-time organizer for the applicant, convened two evening meetings of employees on February 1 and 2 to discuss the merits of joining the applicant for the purposes of collective bargaining. Each meeting lasted at least two hours and no membership cards were signed until the second meeting. The employer called two witnesses. Robert Hendriksen, an employee of the respondent, testified in examination-in-chief that O'Donnell described the initiation fee structure of the applicant by saying “if you pay \$5.00 now it would not be necessary to pay \$50.00 or \$55.00 when the union got in”. He said he signed a card to save himself the extra money and that a few days after the second meeting Shawn Comeau, another employee, told employees that “the \$50.00 comment was a mistake”. He testified that O'Donnell said that union dues would have to be paid whether or not an employee signed a card. He summarized his recollection of what O'Donnell said by stating “if the union got in and an employee did not sign a card that day (i.e. the day of

the meeting) the employee would have to pay \$50.00 and if the union got in an employee would have to pay union dues regardless". On cross-examination he admitted that the organizer may have said that only new employees joining the respondent after the execution of a collective agreement would be required to pay a higher initiation fee. He further agreed that there was no suggestion that an employee would lose his job if he did not sign a union card. However, on re-examination he said he thought he would have to join the union if the union did get in although it is not clear that this belief arose from anything O'Donnell said. And, finally, he admitted to being an established supporter of the applicant prior to the calling of the two meetings and that he actively supported it after the second meeting was held. He said he attended two meetings called by the employer on February 5th in the warehouse by Mr. Leon. He said Mr. Leon asked the employees to give him a chance — at least thirty days — to straighten everything out. He agreed that he was one of the employees who thought the requested time should be given to the respondent. He further testified that Leon gave the employees some telephone numbers should they want to talk over wages and promotions. Hendriksen agreed that he was one of the employees who went in to talk to Mr. Leon on these matters.

6. Ken McCallum testified. While he was a supervisor a few weeks before the application for certification, it is clear he was a member of the bargaining unit at the time the application was filed with the Board. He attended the second meeting convened by O'Donnell. He testified that O'Donnell told the employees that "it was \$5.00 if they wanted to join the union now and that if they didn't join before the union was in effect they would have to pay \$50.00 or \$55.00 whether they joined the union or not". From the evidence it is clear that O'Donnell and certain of the other employees knew McCallum was against the applicant; however, O'Donnell had no objection to his attendance at the meeting. McCallum testified that he asked O'Donnell "whether an employee had to pay all the money even if he did not join the union" and O'Donnell replied that he would. On cross-examination he said he was explicit in indicating that he meant the initiation fee and union dues by this comment but he was not sure that O'Donnell heard his inclusion of the \$50.00. McCallum also testified that Comeau spoke to him on approximately February 5th and explained that no additional initiation fee would be required and that, indeed, existing employees could join "for free". Both Hendriksen and McCallum stated that O'Donnell was unsure of the regular initiation fee for the applicant local union but that the fee for his own local was \$55.00. Thus, he assumed the regular initiation fee for the applicant would be in the area of \$50.00 or \$55.00.

7. Jim O'Donnell testified. He had conducted one organizing campaign before this one and had participated in two others where he spoke to the employees. He had also assisted ten or eleven others and had been involved in organizing since October 5, 1981. He had taken a course at Humber College about the subject as well. He said he approached the two meetings with a desire to avoid misunderstanding and to be honest. He testified that the normal initiation fee was not discussed at the first meeting, only union dues and the \$5.00 application fee. At the second meeting, however, he testified he told those attending that he was unsure what the normal or regular initiation fee was for this local but that it would apply only to new employees in any event. He said he told them the regular fee for his local was \$55.00. He testified that at both meetings he made an initial presentation to the employees, answered questions and then left the room to give them an opportunity to decide if they wanted to proceed with their interest in collective bargaining. He said he told the employees that it would not be easy to deal with the respondent and told the Board that he wanted to know what he was up against. In short, he wanted the employees to make a conscious and deliberate decision to go forward. However, he agreed that questions to him by Comeau on February 5th and

Hendriksen on February 8th indicated that some employees were confused over the application of the applicant's initiation fees to employees who did not join the applicant right away. He said he was frustrated over this continuing problem and instructed both employees to tell others that no additional fee had to be paid by existing employees. The applicant's policy was explained as permitting all current employees of an employer to join for \$5.00. Employees who did not join during the organizing drive would be given a further opportunity to join for \$5.00 on the signing of a collective agreement. However, all new employees must pay the regular initiation fee.

8. The applicant also called two employees of the respondent in answer to the respondent's charges. Shawn Comeau was described as the "key employee" by O'Donnell and had made the initial contact with the applicant. He testified that at the first meeting O'Donnell spoke of the \$5.00 fee on signing a card and the fact that union dues would start on the execution of an acceptable collective agreement and would likely amount to two hours wages a month. He said that at the second meeting O'Donnell indicated that persons who commenced employment with the respondent after the signing of a contract would have to pay more. Comeau said O'Donnell did not know the precise initiation fee for the applicant but his local required \$55.00. Comeau said all the cards were signed at the conclusion of the second meeting. A few days later when a group of employees were trying to persuade another employee to join the applicant, Comeau said someone said "it would cost more if the employee did not sign now". Comeau did not think this was right and decided to seek clarification from O'Donnell. He did this on February 5th and O'Donnell told him only new employees would have to pay more. Comeau reported back to Ken McCallum and others that no higher fee was required if an employee did not join the union now. Glen Spurr is an employee of the respondent and attended the two meetings. He said there was considerable discussion about fees both evenings. He understood O'Donnell to say anyone newly employed by the respondent after the applicant was in would have to pay an increased fee and for O'Donnell's local this was \$55.00. Spurr later learned that the applicant's normal initiation fee was \$50.00. However, he understood that for employees already employed by the respondent it was going to cost only \$5.00. On cross-examination he agreed that there was confusion in the workplace over the topic but that Comeau "cleared it up". He also agreed he did know if employees were confused on the evening they signed their cards. He clearly was not.

9. Counsel for the respondent asserted that at least two employees were under the impression that "it was \$5.00 now or \$55.00 later". He submitted that on the balance of probabilities the Board should find that O'Donnell made such a representation. Alternatively, he submitted that it was enough if O'Donnell's comment unintentionally led employees to believe that a two tier fee structure existed. It was his submission that this confusion casts a serious doubt on the validity of the membership evidence filed and that the Board should either dismiss the application or order a representation vote. Great reliance was placed upon the Board's decision in *Alex Henry & Son Ltd.*, [1977] OLRB Rep. May 288. For the applicant it was submitted that the alleged statement was not made and that the Board had to worry about "persons hearing what they wanted to hear". Counsel stressed that, unlike the *Alex Henry & Son Ltd.* case, the job security of employees had not been tied to joining the trade union. It was submitted that the Board ought not to require an unrealistic level of communication by organizers. Reliance was placed on *Hancock Sand & Gravel Limited*, [1978] OLRB Rep. Oct. 928.

10. The statute permits the Board to certify applicant trade unions to represent

employees based upon written authorizations involving the payment of at least \$1.00 where such “membership documents” are properly executed and witnessed and where the application is supported by a declaration made by a knowledgeable official, declaring that the monies were paid as the membership documents indicate. See for example Form 9 and sections 1(1)(1) and 103(2)(j) of the Act. Thus, the Board relies on the execution of such membership evidence as an indication of the true wishes of employees and where more than 55 percent of the employees in the bargaining unit are members of the trade union, the Board will usually certify the applicant without a representation vote. However, because of the “hearsay” quality of membership cards, a fact demanded by the membership secrecy section of the Act (see section 111(1)), conduct by organizers that obscure the primary reason why an employee signed a membership card is of concern to the Board. Misrepresentations, coercion and intimidation leading to the execution of membership evidence all undercut the reliability of such evidence as a true indication of the voluntary wishes of employees. On the other hand, the intricacies of collective bargaining can be difficult to explain and the organizing process undoubtedly involves controversy and salesmanship. Organizers are often inexperienced rank and file members.

11. The board has drawn the line of regulation between salesmanship and improper conduct at fundamental misrepresentation, coercion and intimidation. Such conduct, when engaged in by trade union officials, will usually result in the Board’s refusal to rely on any of the membership evidence submitted whereas the involvement of rank and file supporters may cause the Board to reject only the membership evidence handled by such persons. The latter depends upon the state of knowledge of trade union officials and their related conduct to rectify matters if they were aware of the improper conduct. The Board has not attempted to lay down standards of conduct aimed at responding to confusion and misunderstanding. Rather, it has tried to strike a balance between competing interests by censuring conduct that could deter, coerce or mislead the reasonable employee. The reduced payment before certification has been viewed by the Board as a borderline tactic which has sometimes crossed the line of acceptability.

12. In *Canadian Electric Box and Stampings Limited*, [1964] OLRB Rep. Sept. 284 certain employees who were soliciting union membership on behalf of the applicant told other employees that if they did not join the union and pay a \$1.00 initiation fee it would cost them between \$25.00 and \$75.00 after certification. The mixed feelings of the Board in dismissing the objection is revealed where it writes:

... If a union can do this [i.e. reduce its initiation fee for an organizing drive] then the suggestion that it will do so cannot of itself be an unfair labour practice especially where the suggestion is made by persons who are not officers or representatives of the union. In any event, such suggestions could not be construed as threats since the persons making them were known to have no power to enforce them. In this case, the Director of Organization of the applicant union stated at a union meeting that the initiation fee would not be increased after certification.

The conduct of the employee members of the applicant against whom the above allegations were made in this case is not the type of conduct which in our opinion, could be classified as intimidation or coercion of the type found in the *Milnet Mines Limited Case*, Canadian Labour Law

Reporter, Transfer Binder '49-'54, ¶17,063, *Canadian Fabricated Products Limited Case*, Canadian Labour Law Reporter, Transfer Binder '49-'54, ¶17,090, in which cases threats were made which were of a type which could reasonably be carried out and would have adversely influenced the average employee.

13. The case of *Kitchens of Sara Lee (Canada) Limited*, [1964] OLRB Rep. April 44 demonstrates the Board's willingness to distinguish between salesmanship and misrepresentation in a case not involving a two tier initiation fee. In that case the union organizer told employees that the company "wanted a union but it was something it could not do for itself". In dismissing the respondent company's charges the Board observed:

It must have been obvious to the employees that he was making a "sales pitch" to gain support for the applicant union. Considering the misrepresentation in this light and in the context of all his remarks we do not think that the employees were so misled as to impair their ability to make a reasonable evaluation of his "pitch" and to determine its true worth. Certainly nothing was said which can be interpreted as an attempt to intimidate or coerce the employees. The employees must have known that as a union organizer Zimmerman could not affect their employment status. In all the circumstances we do not find that the misrepresentation amounts to fraud. The employees clearly understood that they were being asked to join an international trade union and Zimmerman outlined to them the economic objectives which the union intended to pursue in relation to the respondent company. These objectives are hardly compatible with the company wanting the union in the plant. Nevertheless, each of the three employees testified that she joined the union because she believed Zimmerman's statement. In determining the weight to be given to this portion of their evidence we are not unmindful of the fact that three months had elapsed since they had joined the union. Referring specifically to the evidence, Anne Ashton testified that even after Zimmerman's speech she was not prepared to join the union. It appears from her testimony that she only signed a membership card as a result of the urging of other employees who were present. Erna Peters stated that she thought it was very unusual that the company wanted the union. In view of the economic demands which Zimmerman informed the employees he intended to make on the company we are not surprised that she thought it was unusual or even incredible. The evidence of Sharon Smith is so uncertain that we can give little weight to her testimony. Considering the evidence of the three women in its totality, we do not accept their hindsight explanation for joining the applicant union. In our opinion, the employees were quite capable of making, and in fact, did make the decision to join the applicant union of their own volition.

14. On the other hand in *Walter E. Selck of Canada Ltd.*, [1964] OLRB Rep. June 138 the union's organizational campaign was under the sole direction of a rank-and-file employee. She had signed up all but three of sixty-two membership cards and two employees testified that she told them if they refused to sign and the union got in they would be without a job. These witnesses also stated that they informed other employees of this. After the organizer did not refute the charges the Board dismissed the application and wrote:

On the evidence before us the threats in question were clearly, in our opinion, contrary to the provisions of section 52 of *The Labour Relations Act* and, therefore, they did constitute unfair labour practices. Our experience in such matters compels us to take cognizance of the fact that the question as to whether a person was or was not influenced to sign a petition or a union card by threats of economic reprisal, is often more reliably ascertained from the objective facts as whole than from mere subjective assertions from witnesses given later. However, even if we were to find, as argued by counsel for the applicant, that the particular two employees in question, as it turned out, were probably not in fact influenced by the threats of economic reprisals made by Mrs. Angel, we are not persuaded that we should or can disregard them. In this respect we have no assurance that employees other than the two in question did not sign cards under and as a result of the knowledge of such threats being made to the two persons in question or of similar threats being made to them by Mrs. Angel.

15. In *L. M. Welter Limited*, [1965] OLRB Rep. April 34 a representative told at least two employees that if they joined the applicant now, it would be at a special rate and, further, “if they didn’t want to have anything to do with the union they would be out of a job”. The Board found that the employees took the last statement seriously and decided it could give no weight “to membership evidence filed by the applicant on behalf of these employees”. This ruling was sufficient to dismiss the application.

16. In *VR/Wesson Limited*, [1968] OLRB Rep. Nov. 811 an organizer told an employee he would be “the first man fired” when the union was certified. The organizer was not a fellow employee but was the financial secretary of the local union of the applicant at another plant. He had signed up seven of the applicant’s twenty-three members. Relying on *Milnet Mines Limited* 53 CLLC ¶17,063 the Board concluded it was unable to accept as satisfactory proof of membership any of the documentary evidence filed by the applicant. In the *Milnet Mines Limited* case, *supra*, representatives of the applicant trade union threatened to assault several employees of the respondent as “part of a deliberate and calculated scheme to put the organizers of the intervener in fear and to drive them out of town”. The Board concluded that conduct was of such a nature that men of ordinary fortitude and convictions would be inhibited from joining the intervener.

17. In *Fabricon Manufacturing Limited*, [1969] OLRB Rep. June 353 a rank and file employee had told employees they would be fired if they did not join the union although union officials were unaware of this statement. In dismissing this objection the Board emphasized that the employees would have known that the offending employee would have no authority over them and trade union officials had not been involved.

18. In *Green Giant of Canada Limited*, [1973] OLRB Rep. June 376 the Board again dealt with a situation in which one employee told another he would either lose his job or have to pay a fine later. The Board dismissed the charges because the representations had not been condoned by the applicant union and could have been checked by the person’s fellow employees. The Board found that the actions of the employee organizers were not such as would unduly influence a reasonable employee and did not constitute intimidation, coercion or threats within the meaning of the Act. See also *The Kendall Company (Canada) Limited*, [1975] OLRB Rep. Aug. 611.

19. In *Alex Henry* a full-time union organizer associated with Mr. O'Donnell's local was found to have told employees at a meeting "that they could join the union at that time for a fee of two dollars but that if they joined at a later date it would cost them fifty". An employee called by the respondent testified that he took that statement to mean that if the applicant was successful in its certification drive those employees who did not join prior to certification and who wanted to retain their jobs afterwards would be required to join the union at the higher initiation fee. The union organizer failed to clarify that this would only be so if a compulsory union membership clause was negotiated and where the union was unwilling or unable to waive the higher fee. The union organizer was present at the hearing but did not testify to explain or refute the allegation. The Board feared that the statement raised a real misapprehension among employees as to their rights in respect of the trade union. The Board noted:

10. We are not, however, satisfied that the statement might not have raised a real misapprehension among the employees as to their rights in respect of the union. A reasonable employee hearing Mr. Reilly might well have concluded that upon the union being certified he would have no alternative but to pay the higher fee if he wanted to keep his job. An employee forming that view might have signed a membership application as a result of what amounts to a tacit misrepresentation on the part of the union representative.

11. The Board's consistent policy in certification proceedings has been to require the highest standard of integrity on the part of union officers in the soliciting, gathering and presentation to the Board of documentary evidence in support of their application. Since that evidence remains confidential, is not subject to cross-examination and is the principal evidence on which the Board must rely in certification proceedings, it must be free of any cloud or taint. If, in view of the circumstances touching the soliciting and collecting of the membership evidence, the Board is left in doubt it may use its discretion to order a representation vote to resolve that doubt.

12. A union officer is under a duty to refrain from making false or misleading statements in the course of an organizing campaign. We find that the statement of Mr. Reilly, which might better be termed a half-statement, is latently, if not patently, misleading. His failure to explain his statement to the employees by omitting to say that the higher initiation fee would be forced on them only if the union could succeed in its application for certification, could thereafter successfully negotiate a union shop contract with the employer and would at that time be unable or unwilling to waive the higher initiation fee, leave this Board in some doubt as to whether employees for whom membership evidence was filed were in fact misled and therefore unable to fairly weigh the meaning of Mr. Reilly's statement as it might affect them. This raises some doubt as to whether the membership evidence filed is an expression of the true wishes of the employees.

20. While there had been no explicit linking of the higher initiation fee to an employee's

job security, the Board found that an employee might reasonably see this link and therefore held that the full-time union organizer is under a duty to explain in detail how his statement might come to pass. Once having raised a topic that relates to job security and amounts to a significant financial enticement, there is an affirmative obligation on the organizer to be totally candid. Therefore, in *Alex Henry* the Board concluded that the bald statement "\$2.00 now or \$50.00 later" crosses the boundaries of acceptable salesmanship. However, instead of prohibiting a two tier initiation fee structure for the purposes of an organizing campaign, the Board has instead required complete disclosure on how it would impact on the employee who refuses to sign a membership card before the trade union is certified. This, it seems to us, is a reasonable approach given the reality that many trade unions customarily reduce their initiation fees for the purposes of organizing campaigns.

21. In *Crenmar Services Limited*, [1978] OLRB Rep. Jan. 48 someone other than a full-time union organizer told a few employees that "you can sign now for two dollars, but once the union gets in it will cost up to a hundred and fifty dollars". The employee who testified said he was motivated to sign a card by the statement but on cross-examination admitted he had earlier expressed a desire to become a union steward. In dismissing the objection the Board emphasized that the statement was made by a rank and file employee who was not an organizer, and went on to hold:

20. Unlike the situation with a union official, a rank-and-file employee is not in a position to seek to achieve the consequences of any statements he may make during a union organizing campaign. Further, employees upon hearing any statements made by rank-and-file employees concerning what a union might do in the future can always check out the accuracy of those statements with a responsible union official before signing a membership application. Having regard to these considerations, the Board is generally less willing to infer that a reasonable employee is likely to be improperly influenced into signing a membership card on the basis of statements made by a rank-and-file employee than it is with respect to statements made by a union official. (See: *Canadian Electric Box and Stampings Limited*, [1964] OLRB Rep. Sept. 284; *Green Giant of Canada Limited*, [1973] OLRB Rep. June 376 and *The Kendall Company (Canada) Limited*, [1975] OLRB Rep. 611.) In the instant case the Board is likewise not satisfied that reasonable employees were likely to have been misled by what was said by the unidentified rank-and-file employee. This being the case, the Board declines to order a representation vote on the basis of any concern that employees generally may have been misled into signing membership applications.

22. In *Hancock Sand & Gravel Limited*, [1978] OLRB Rep. Oct. 928, the Board again dealt with the use of a two tier initiation fee representation by rank and file employees. Two to four employees were told that if an employee paid \$1.00 now "then he would only have to pay \$15.00 to join the applicant but that if he waited it would be \$100.00". No employee made an assumption linking the statement to job security and none of these employees joined the applicant. And at least one of the union organizers alleged to have made the statement testified that he said the higher initiation fee was restricted to new employees. In dismissing the charges the then Chairman of the Board wrote:

13. What effect do these statements have on the membership evidence submitted by the applicant? There is no evidence that these statements were other than isolated incidents occurring during the applicant's organizing drive. It is significant, moreover, that these statements were made by rank-and-file employees, and not by a full-time union official. What we are dealing with here are honest attempts by ordinary employees to explain the applicant's fee structure. The conversations did not contain any express threat to job security, nor is it reasonable to read into these statements any implied threat to job security. If the statements made gave rise to any misunderstandings, the employees involved had full opportunity to seek clarification which they chose not to do.

14. This situation here is unlike that found in *Alex Henry & Son Ltd.*, *supra*, where a full-time union official at a meeting of employees did not disclose fully the union's fee structure, leaving the clear implication that employees who did not join immediately would have no alternative but to pay the higher fee later if they wished to keep their jobs. In these circumstances the Board held that the union official had the responsibility to clarify any statements that might be construed by employees as being a threat to their job security.

15. The Board considers that it would be unrealistic to expect the same standard from the rank-and-file organizer as from the full-time union official. It is reasonable to assume that the ordinary employee is less conversant with the operation of union security provisions. If less than a full explanation is provided by him, moreover, its impact upon other employees is likely to be less than where the statements of a full-time union official suffer from the same defect. As the Board indicated in *Cremar Services Limited*, [1978] OLRB Rep. Jan. 48, the rank-and-file organizer is not likely to be perceived by his fellow employee as being in a position to seek to achieve the consequences of any statements he may make during a union organizing campaign. Where employees discuss the merits of joining a union among themselves, it does not seem unreasonable to expect that a few misconceptions might arise, some lending support to the union and some working the other way. We consider that employees are quite capable of dealing with such misconceptions by seeking any necessary clarification, and then making an informed decision as to whether they wish to join a union.

In this case, the Board was obviously concerned about imposing an "unrealistic" standard for accuracy and disclosure on "the rank and file organizer". In the instant case we are dealing with the alleged representations of a full-time union organizer.

23. In *Bond Structural Steel (1965) Ltd.*, [1979] OLRB Rep. Dec. 1137 the respondent alleged that an employee who had signed the majority of the employees told them they could join now for \$1.00 and that it would cost them \$150.00 later. The rank and file organizer denied making the statement but the Board proposed to deal with the matter on the basis that he had. The Board emphasized that there had been no direct reference to loss of employment and was not prepared to conclude that an employee might reasonably make the link. The

Board also went on to emphasize that the employee was not a union official and dismissed the charge. Finally, in *Thames Steel Construction Ltd.*, [1980] OLRB Rep. April 545 an employee told another employee that the cost to join the applicant then was \$1.00, but if he did not join he would have to pay a penalty of \$120.00. In fact, the dispensation for employees of the respondent was not restricted to organizing and the employer argued that the statement amounted to a misrepresentation. In dismissing the objection the Board reviewed its jurisprudence and found that the employee in question “was a rank and file employee of the respondent, did not obtain and file with the Board a single membership card in the applicant and did not succeed in persuading the employee to whom he spoke to sign an application for membership in the applicant union”.

24. O'Donnell is a full-time organizer. The Board has concluded that the alleged representation when employed by such an official is sufficiently coercive and distracting to the reasonable employees that a representation vote should be directed to eliminate any doubt over the true wishes of the employees. Accordingly, if the evidence adduced by the respondent establishes the allegations made before us, a representation vote should be directed. We are in full support of the *Alex Henry* principle.

25. Having carefully reviewed this evidence, however, the respondent has not established that O'Donnell advised employees that they could pay “\$5.00 now or \$50.00 or \$55.00 later”. O'Donnell denied it and his testimony was not unconvincing although he was not as clear on the applicant's initiation fee as he might have been. In cross-examination, it was not demonstrated that he made the alleged statement or that the applicant's policy required existing employees to pay a higher fee if they did not join before the applicant was certified. Spurr and Comeau were at the two meetings and they denied the statements were made. They understood that all existing employees had only to pay \$5.00 and when a contrary view was put forward by some other employee after all the cards had been signed, Comeau went and checked and O'Donnell gave the proper clarification. The two employees called by the respondent could not be certain the representation was made and, on the evidence, we do not believe Hendriksen when he says this is why he joined the trade union. He had decided to support the applicant before the meetings were held and he assisted afterwards. McCallum was careful to point out that O'Donnell may not have understood his question to include initiation fees when he asked whether a non-member had to pay “all the money”. We do accept that there was confusion after the second meeting and there may have been confusion immediately after O'Donnell spoke at each meeting. But we cannot find that O'Donnell intended to create this confusion and we are not willing to exercise our discretion and order a representation vote every time there is some confusion on the nature of union security, initiation fees and dues obligations. People who are asked to join a union are expected to be able to sort out most of the confusion by asking questions before they act. If they do not, this Board is reluctant to treat them any differently than they are treated when acting in a broader commercial context.

26. We are therefore prepared to accept the membership evidence submitted by the applicant subject to a consideration of the petition and counter-petition also filed with the Board before the terminal date. At the hearing it was announced that an examination of the respondent's records filed with the Board revealed twenty-seven employees employed within the bargaining unit as of the date of application. The applicant filed documentary membership evidence for seventeen of these employees consisting of membership cards in the form of combination applications for membership and attached receipts. The applicant required the

support of only fifteen employees for certification; however, there was also filed with the Board a timely but undated statement of desire or petition bearing the signatures of ten employees, five of whom had signed membership cards in the applicant and paid the required initiation fee. There was further filed with the Board four counter-petitions signed by employees who had both signed the petition and joined the applicant and who, by such counter-petitions, purported to withdraw their support from the petition and to reaffirm their support for the applicant.

27. The applicant union, in order to shorten the hearing, was prepared to withdraw its charges over the respondent's alleged conduct and accept that the petition was, subject to the existence of the counter-petition, a voluntary expression of employee wishes at the time it was signed. Counsel for the respondent, the petitioners and counsel for the applicant trade union in turn agreed that the counter-petition and the petitioners could argue that even if the counter-petition withstood the Board's scrutiny a representation vote should be ordered because of the vacillation of many employees.

28. On the matter of counter-petitions the Board in *National Seal Division of Oil Seals Ltd.*, 63 CLLC ¶16,295 has said:

It is contended by counsel on behalf of the intervener, that no provision is made in the Act or in the Board's Rules of Procedure for filing or receiving counter petitions. On this basis, he argues that the Board has "no jurisdiction" to receive or consider them. Alternatively, he argues that even if the Board can and does receive and consider the counter petitions, they should not be given equal weight with the signatures on the petitions. In this respect, it is his contention that the signatures on the counter petitions only emphasize the fact that the employees are in a state of doubt. This doubt, he argues, must be resolved by a representation vote. While the Board's Rules of Procedure do not make any express provision for, or indeed mention any procedure for the filing of documents in the nature of the counter petitions filed in the present case, it does not follow that this, therefore, establishes that the Board has "no jurisdiction" to receive and consider them. In our view, the counter petitions clearly constitute evidence relating to membership within the meaning of section 77(j) of *The Labour Relations Act*, and of section 50 of the Board's Rules of Procedure. It is, therefore, abundantly plain to us, that so long as these documents are filed by the terminal date, they may be received and considered by the Board as evidence relating to membership under the general provisions of section 77(j) of the Act and section 50 of the Board's Rules of Procedure. It has, of course, long been the well-established practice of this Board to admit such counter petitions in evidence. Finally, we do not accede to the argument that merely because a certain type of evidence, relevant to proceedings before the Board, is not mentioned or no procedure of form for filing it is spelled out in the Act or the Board's Rules of Procedure, the Board is, therefore, without "jurisdiction" to receive it. Such evidence may, of course, be admissible (subject to the rules of evidence and any qualifications expressly or impliedly imposed by statute) on the sole ground that it is relevant to the determination of an issue before the Board.

The effect of counter petitions or revocations in respect of signatures placed on an earlier petition in opposition to an application for certification has been considered by the Board in the past and again recently in *The Fleck Manufacturing Ltd.* case, CCH Canadian Labour Law Reporter, vol.1, ¶16,236 at p. 13,201, as follows:—

In cases where revocations are filed in respect of signatures to a petition and it is evident to the Board from all the circumstances that the persons signing the revocations intended to revert to and reaffirm their original positions as reflected by the evidence of membership filed by the union, the revocations and original evidence of membership represent the most persuasive and reliable evidence of their wishes....

We are constrained to infer from the facts agreed to by all counsel in this case that the persons who signed the counter petitions did so with the intention of reverting to and reaffirming their original positions as reflected in their applications for membership and receipts filed by the union as evidence of membership. In our view, therefore, the most reliable evidence of the true wishes of the employees is that which is represented by the original evidence of membership submitted by the union and now reaffirmed by the counter petitions.

29. Mr. Comeau testified that after speaking to certain employees who had both joined the union and signed the petition, he called the applicant “to find out how the employees could sign back”. He spoke with Mr. Al LeFort who explained the procedure. When Comeau had determined that enough employees were interested in affirming their support for the applicant, LeFort agreed to meet them “after hours” at 5:00 p.m. that day in the employees’ parking lot of the respondent. Comeau stated that LeFort asked whether Comeau had “twisted their arms or anything” and Comeau assured him he had not. The evidence reveals that LeFort attended the premises as he promised. The four employees came to his car in pairs. He identified himself to them by his business card. He showed them the form of the counter-petition which he had filled in except for names and signatures. He read the form aloud to them and asked if they had any questions. He confirmed to them that they were under no pressure to sign and that no one would hold anything against them for refusing to sign. Each employee then expedited a counter-petition. Also adduced into evidence was a newspaper article from The Toronto Star dated February 5, 1982 entitled “Workers pay for dropping their union”. The article, in somewhat one-sided terms, described the dilemma of employees who had “voted out” their union. This article was distributed by supporters of the applicant, on the urging of O’Donnell, in response to the meetings of employees held by the respondent’s officials referred to earlier in this decision. Counsel for the respondent contended that the existence of the article in the workplace should be viewed as undermining the reliability of the counter-petition. He therefore submitted that in light of the existence of the voluntary petition the Board should direct a representation vote. We cannot agree. Having regard to all of the circumstances we find that the counter-petitions constitute a voluntary expression of employee wishes and that the most reliable evidence of the true wishes of employees is that which is presented by the original evidence of the membership submitted by the applicant and now reaffirmed by the counter-petitions. We think the newspaper article would have been understood for what it was and its content does not rise to a level of misrepresentation, coercion or intimidation. It would also

appear that the respondent provoked the distribution of the article by meetings with employees held by its officials.

30. On the basis of all the evidence before it, the Board is satisfied that more than 55 percent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on February 12, 1982, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

31. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER JAMES A RONSON;

1. I do not feel that the union organizer, Mr. O'Donnell, met the requirements as set out in *Alex Henry & Son Ltd.*, [1977] OLRB Rep. May 288 when he discussed initiation fees at the meetings. I would order a vote.

2. We heard evidence from two employees that they understood that they could pay \$5.00 now or more later. More telling was the evidence from a union witness that when a group of employees were trying to sign up an employee at the plant one of the group said "it would cost more if the employee did not sign now".

3. In his direct evidence Mr. O'Donnell was certain that he had fully explained his union's policy on initiation fees to the employees. However, when the Chairman attempted to question him on the specifics of the policy he was unable to answer the questions and said that union counsel or Mr. Al LeFort (a union organizer for 21 years) would have to answer them.

4. As a result of this evidence I am led to conclude that Mr. O'Donnell did not explain the policy as required the the *Alex Henry* case and is responsible for the confusion within the membership and the doubt cast upon the membership evidence.

**1943-81-U Mechanical Contractors Association of Sarnia,
Complainant, v. Mechanical Contractors Association of Ontario,
Respondent, v. Industrial Contractors Association of Canada,
Intervener**

Duty of Fair Representation – Unfair Labour Practice – Employer bargaining agency denying complainant access to meetings on negotiations – Whether denial arbitrary in contravention of section 151(2) – Board assimilating section 151(2) duty to union's duty of fair representation

BEFORE: George W. Adams, Q.C., Chairman, and Board Members H. J. F. Ade and C. Ballentine.

APPEARANCES: *Robert P. Armstrong, Q.C., Anne Molloy, David Butt and Bruce Callum for the complainant; R. A. Werry, J. McCarron and W. Nicholls; Roy C. Fillion, T. J. Westley, L. G. Gauvin and I. Stamp for the intervenor.*

DECISION OF THE BOARD; March 12, 1982

1. The complainant, Mechanical Contractors Association of Sarnia (MCAS) complains that it has been dealt with by the respondent, Mechanical Contractors Association of Ontario (MCAO) contrary to the provisions of section 151(2) of the *Labour Relations Act*. Section 151(2) provides:

A designated or accredited employer bargaining agency shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employers in the provincial unit of employers for which it bargains, whether members of the designated or accredited employer bargaining agency or not.

2. In *Dominion Maintenance Limited*, [1979] OLRB Rep. Oct. 940 at 950 the Board said that section 151(2) has the same purpose as section 68 which protects individual employees from arbitrary, discriminatory or bad faith treatment at the hands of a bargaining agent trade union. Section 151(2) protects individual contractors against the same kind of conduct and for that reason the jurisprudence of the Board in trade union fair representation cases is directly applicable to the facts and complaint before us in the instant matter.

3. The facts are not in dispute. On April 3rd, 1978 the Minister of Labour designated the respondent as the province-wide employer bargaining agency for certain employers, which employers included the members of the MCAS. The designation was subject to the express condition that the respondent file with the Minister's office a copy of the appropriate changes to its constitution to accommodate the intervenor, the Industrial Contractors Association of Canada (ICAC).

4. The respondent's membership includes both union and non union employers. The respondent delegated to a subcommittee, the Mechanical Trade Bargaining Committee (MTBC), the negotiation of labour contracts. The complainant, together with other zone affiliates, objected to the participation of non union employers in labour matters on the grounds that this created a conflict of interest which could seriously and adversely affect all of the direct members of the respondent who are unionized employers. As a result of these

objections and after considerable debate and review within the respondent organization, certain changes were made to the respondent's by-law and constitution to provide that only union employers would participate in the MTBC and that non unionized members of the respondent would have no right to vote on matters relating to labour relations.

5. During the period preceding this complaint certain non union members in the Kitchener area complained that they were being expelled from the zone affiliate by union members represented by that zone affiliate. After study and debate within the respondent organization it was decided to permit the formation of zone affiliates made up exclusively of non union members. It was also decided that because a non union member has no interest in the labour relations activities of the respondent through the the MTBC that non union members ought only to pay two cents of the three cents per man hour regular fee for full members. It was also decided that where such new affiliate was being organized that the membership fees could be waived for the first year so that more funds could be available for organizing activities of the new affiliate.

6. The ICAC is not a member of the respondent but, by virtue of the proviso in the Minister's designation, it has been accorded a seat on the respondent's Board of Directors and on the MTBC. However, the ICAC's participation and voting is limited to labour relations concerns. The MCAS, as a zone affiliate of the respondent prior to its expulsion, was also represented on the respondent's Board of Directors and on the MTBC but in both instances had full voting status. In this respect, the MCAS was one of thirteen zone affiliates and entitled to cast five votes on the basis of one vote per zone plus one vote per 200,000 man hours or a majority thereof. MCAS therefore was the third largest zone affiliate making up the respondent. It is also important to note that Zone 5, Sarnia, had its own appendix to the Ontario Provincial Collective Agreement (1980-1982) between the MCAO and the Ontario Pipe Trades Council. The appendix is five pages in length and deals with a number of labour relations matters peculiar to the Sarnia area.

7. The ICAC has been accorded a special financial arrangement with respect to compensation by the respondent organization for certain negotiation expenses. The rationale for this special arrangement arises because the ICAC does not collect the ten cent per hour industry fund collected by other zone affiliates under the Provincial Agreement and thus is not able to retain funds to offset such expenses.

8. The complainant became increasingly concerned about the involvement of non union members in the activities and programs of the respondent and finally came to the decision that it was no longer in its interest to remain a full member of the respondent, although it still desired to participate in the MTBC. The complainant thereafter notified the respondent by letter dated March 13th, 1981 that it no longer wishes to participate in the respondent's affairs, save and accept at the MTBC level and that, accordingly, as of March 13th, 1981 it would pay fees of only one cent per man hour, representing the labour relations portion of the membership fees. Thereafter, the complainant forwarded to the respondent each month cheques for membership fees calculated at one cent per man hour for the remainder of March 1981 and for the months of April, May, June, July, August and September. The respondent refused to accept all such payments. Paragraph 26 at page 16 of the Constitution provides:

All members shall be liable to the Corporation for such fees as are

imposed from time to time by the directors. A member who does not pay any fee determined by the directors or any assessment made by the directors and approved by the members as aforesaid within the time fixed for payment (or within 30 days after notification has been mailed to him by prepaid registered post requiring such payment if that is later) shall automatically cease to be a member but on payment of all unpaid fees and assessments may be reinstated in the discretion of the directors.

9. By letter dated September 10th, 1981 the respondent advised the complainant that its membership was terminated effective June 19th, 1981 by reason of its failure to submit the current membership fee. The said letter also states "... that as MCA Sarnia is no longer a member of this Association it is not eligible to participate in Associating committees, and therefore cannot send a representative to the MTBC for the 1982 negotiations."

10. Finally, it was established that while a representative of the complainant was permitted to attend the October 15th, 1981 meeting of the MTBC, the complainant has not been given adequate notice of subsequent meetings nor has it been invited to attend such meetings. Numerous witnesses called by the complainant were of the opinion that the respondent would not adequately and fairly represent the complainant and its members unless the complainant had a "voice and a vote" on the MTBC for the forthcoming negotiations. Evidence established that the Sarnia area has many unique problems relating to construction associated with the petro-chemical industry. There was also evidence to suggest that a "boom" in construction in that area was about to commence.

11. Reducing the arguments of the parties to their simplest form, it was submitted on behalf of the complainant that section 151(2) of the *Labour Relations Act* required that the complainant be granted a voice and a vote in the activities of the MTBC in order that the MCAO honour and comply with its obligations under the statute. The intervener made submissions in support of this argument. On behalf of the respondent, it was submitted that the dispute between the complainant and the respondent related to the internal affairs of the respondent organization and should not be a concern to this Board under section 151(2).

12. Having regard to the able submissions of counsel and the evidence before the Board, we find that the respondent has acted in an arbitrary manner by the MTBC failing to properly consult with the former zone affiliate with respect to the preparation, conduct, and progress of negotiations. It is our further view that only the granting of observer status in the affairs of the MTBC for the current round of negotiations will clearly avoid an ongoing violation of section 151(2). In coming to this conclusion we rely heavily on the fact that the complainant is not an individual employer but rather an organization that formerly had the status of a zone affiliate; the complainant in previous negotiations has played a fundamental and pivotal role in the negotiation of the Sarnia appendix; and the fact that the Sarnia area has a number of labour relations problems that tend to be unique to that area. However, we do not accept that the failure to accord the complainant a vote in the affairs of the MTBC relating to the negotiation of the Provincial Agreement constitutes a failure of section 151(2). The scheme of the Act, and particularly section 72(5), reveals that where such a right is intended it is provided for specifically. In all other situations the non-member of a bargaining unit is entitled only to the protection of "fair representation" as provided for in section 68 and 151. While these latter sections may require the bargaining agent to accord the non-member a number of procedural privileges in order that the non-member's interests be

fully appreciated and understood, we do not understand these sections to require the respondent to extend to the complainant the right to vote in MTBC Affairs. The opinions to the contrary of witnesses called by the complainant were interesting but they amount to no more than opinions on the very issue before us. The product of the negotiations must, however, withstand the scrutiny of the fair representation sections of the statute. We also find that the treatment to date of ICAC and non-union members have reasonable rationales and, thus, do not violate the Act. This is not to say that the concern of the complainant over the involvement of non-union contractors in the affairs of the respondent in areas relating to the designation is without considerable merit.

13. For all of these reasons, the Board finds that the respondent has violated section 151(2) of the *Labour Relations Act* and directs the respondent to accord the complainant observer status in the activities of the MTBC relating to current negotiations of the provincial Agreement. This means the complainant is entitled to notice of and attendance at all meetings and negotiating sessions of the MTBC, but is not entitled to cast a vote in the decision-making process of that body.

1927-81-U McKenly Daley, Complainant, v. The Amalgamated Transit Union, Local 1572, Respondent, v. The Corporation of the City of Mississauga, Intervener

Duty of Fair Representation – Practice and Procedure – Unfair Labour Practice – Events giving rise to complaint occurring in 1976 – Delay of five years in filing complaint – Board stating its policy on delay – Not entertaining complaint

BEFORE: R.O. MacDowell, Vice-Chairman.

APPEARANCES: *H. Rawding and McKenly Daley for the complainant; S.L. Stewart, T. Topps and A. Burke for the respondent; M.V. MacLean for the intervener.*

DECISION OF THE BOARD; March 9, 1982

1. This is a complaint under section 89 of the *Labour Relations Act* alleging a contravention of section 68. Section 68 reads as follows:

“A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.”

• • •

3. The events upon which this complaint is based occurred in the fall of 1976. The

complaint itself was filed on December 2, 1981. The respondent union asserts that a delay of more than five years is unreasonable and grossly prejudicial, and that for this reason alone, the Board should exercise its discretion under section 89 of the Act to refuse to inquire into the complaint.

4. On February 17, 1982, the Board scheduled a hearing to entertain the parties' submissions with respect to the matter of delay and whether, notwithstanding that delay, the Board should inquire into the complainant's allegations. The basic facts are not in dispute.

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5. The complainant, McKenley Daley, was hired by "Mississauga Transit" sometime in 1972. He was employed as a bus driver. At all material times, while he was so employed, the respondent union has been his bargaining agent.

6. In June 1976, Mr. Daley was charged with an alcohol-related driving offence. In November of 1976, he was convicted, and his driver's licence was suspended for several months. Without a licence, he could not drive a bus. His union advised him to apply for a leave of absence until the licence suspension was lifted, but, following a meeting to discuss the matter, Mississauga Transit was not prepared to grant a leave of absence on this basis. The provision in the 1976-77 agreement respecting leave of absence reads as follows:

"12.06 An employee may, upon application in writing to the City, be granted leave of absence for personal reasons or to attend to Union business without loss of seniority. The employee must not engage in any other employment during such leave of absence unless authorized to do so jointly by the Union and the City. Any leave of absence of one (1) week or over must be in writing."

Those respecting termination which are potentially relevant to the instant proceeding read:

"12.07 An employee's employment shall be terminated for any of the following reasons:

- (a) If the employee voluntarily quits;
- (b) If the employee is discharged and not reinstated pursuant to the grievance procedure or arbitration provisions of the Agreement;

5.02 Complaints and grievances shall be dealt with in the following manner: All grievances must be in writing and filed within five (5) working days of the alleged grievance, or the City may refuse to consider the grievance.

9.04 No matter may be submitted to arbitration which has not been properly carried through the steps on the Grievance Procedure."

The intervener also advised the Board that it believed that in 1976, it was an established policy, embodied in its rules and agreed to by the union, that an employee's employment would be

subject to termination when his licence was suspended and that the company was under no obligation to provide alternative employment when that occurred. This policy was clearly in effect as early as September 1977. However, because of the passage of time, the parties were unable to submit documentary evidence to show that it was in effect in 1976 although both the union and employer believed this to be the case. For the same reason, there is no evidence to the contrary.

6. In November 1976, there was a meeting to discuss the complainant's situation attended by the complainant himself, his union representatives, and representatives of Mississauga Transit. The complainant concedes that that meeting was amicable and that both the union and the employer were trying to assist him. It was decided that the best course of action was for the complainant to tender a letter of resignation (thereby avoiding a formal discharge) and the employer would make an effort to find him alternative employment while he was unable to drive. The complainant may not have fully understood the effect of his resignation letter and termination of employment but, at the time, he was content with the assurance that efforts would be made to find alternative employment for him and that he would be reemployed by Mississauga Transit when his driver's licence was restored.

7. On November 23, 1976, the complainant's employment was officially terminated. He was unemployed until December 20, 1976, when he was rehired by the City of Mississauga in another department where the employees are not represented by any trade union. On February 24, 1977, after his driver's licence had been restored, the complainant was rehired by Mississauga Transit and, once more, became a member of the bargaining unit represented by the respondent.

8. In March of 1977, Mr. Daley noticed that he was being treated by his employer as a "new hire" — a position which, I am constrained to note, appears to be consistent with Article 12.07 of the then relevant collective agreement, and the general arbitral view concerning the effect of "broken" service. Mr. Daley approached members of management to "get his seniority back", but was advised to discuss the matter with his trade union. This he did in or about June 1977; but the union officials indicated that there was nothing they could do. The complainant did not press the union to file a grievance on his behalf and even if he had done so, and the union had acquiesced, it is evident that such grievance would have faced significant procedural and substantive obstacles. Of course, the merits of Mr. Daley's grievance [i.e. the effect of his resignation, whether he had a right to a leave of absence, and the effect of the time limits] had he filed one, are not strictly relevant to the preliminary issue raised here. But it is relevant that this complaint provides the springboard to arbitration as a means of reordering the relative seniority rights (and associated benefits) of a number of employees in the bargaining unit.

9. In October 1977, the complainant once more approached the employer with respect to his seniority but was dissatisfied with the result. In December 1977, he approached the Ontario Human Rights Commission. The OHRC considered his situation and on January 27, 1978, decided that there was no basis for any further inquiry. At this stage, the complainant's concern was directed solely at his employer. There were no allegations concerning the union.

10. A year and a half went by. During this period, there is no indication that the complainant did anything with respect to his concerns other than (perhaps, the facts are not clear) contact certain municipal politicians. Sometime in the summer 1979, he approached a

community service organization known as the “Human Resources Centre”. A “Mr. Cato” of that organization apparently discussed the complainant’s “seniority problem” with his employer and trade union, but again, without effect.

11. Sometime in October 1979, the trade union held a general meeting. At this meeting, the complainant’s concerns were raised again. It was determined by a vote of the general membership that nothing could, or should be done for Mr. Daley.

12. In March of 1980, more than three years after his termination, Mr. Daley consulted a solicitor for the first time. As a result of this discussion, he wrote to a member of the Provincial Legislature who undertook some investigation on his behalf. That investigation did not alter the status quo. There was still no indication of any allegation of misconduct against the union.

13. Sometime between March and September 1980, the complainant formally retained the solicitor with whom he had earlier discussed his problems. In September 1980, that solicitor arranged a meeting with representatives of Mississauga Transit. Nothing was resolved. The employer took the position that there had been no impropriety on its part but that at this stage, it was not concerned about the calculation of the complainant’s seniority one way or the other. It was a matter between him and the other members of the bargaining unit; however no alteration of the complainant’s relative seniority rights could be considered without the union’s consent on behalf of the other employees in the unit (hired after the complainant’s termination but before his rehire) who would be prejudicially affected.

14. In February 1981, the complainant’s solicitor arranged a meeting with various trade union officials. They indicated, as they had before, that there was nothing further which they could, or thought they should, do on the complainant’s behalf, having regard to all of the circumstances of his case. The complainant’s dissatisfaction was made known to them at that time as was the possibility of an application under section 60 (now section 68) of the *Labour Relations Act*. This was the first time that any concrete complaint had been made against the union.

15. The complainant’s solicitor was absent from her office from March to September 1981, and no steps were taken to launch a section 68 complaint. When she returned in September, she advised that such proceeding should be commenced and in December, it was. Thus, it was not until December 1981, five years after his termination, that the grievor’s dissatisfaction with his treatment by his employer was transformed into a concrete complaint against his union.

16. The collective agreement under which the complainant was terminated and rehired, and under which he would have had to file a grievance about those matters, expired on June 30, 1977. There have been at least two collective agreements negotiated since that time. The complainant now contends however, that this Board should inquire into the events of 1976 and if it finds that the quality of union representation was wanting, it should direct that the leave of absence or the termination issue be sent to a board of arbitration constituted pursuant to the 1976-77 collective agreement. The respondent union denies any impropriety on its part and asserts that it is simply too late to raise this issue. Mississauga Transit denies that there was any breach of the collective agreement on its part, denies that it was under any obligation to grant the complainant an extended leave of absence, and denies that the termination was in any way improper. But counsel advised the Board that the employer was “neutral” as to the principal

issue of concern to the grievor — his seniority. The employer has a residual concern about the position of other employees with broken seniority who have been treated in the same way as the grievor and have not complained but Counsel notes that the seniority issue is primarily of interest to the employees in the bargaining unit. Seniority is the basis for distributing favorable runs, preferred working hours, the selection of holidays, the distribution of overtime, and so on. A determination that the complainant's seniority should be calculated from 1972 (i.e. ignoring his licence suspension, termination and rehiring) has no direct effect on the ongoing operations of Mississauga Transit. It would merely reorder the relative rights of the employees in the bargaining unit. And, although the respondent did not put it quite this way, this was obviously its principal concern, and explains why in October 1979, the members of the local union were not prepared to reopen a case which, to all intents, had been resolved three years earlier.

17. Counsel for the complainant argues that the Board should hear the complainant's case notwithstanding his delay in bringing it. Counsel points out that Mr. Daley has been seeking redress in one way or another (albeit with some lengthy interludes of inaction) for five years. He has never abandoned his concern, or at any time, indicated his acceptance of the status quo. Counsel submits that the Board should take into account that an unsophisticated employee may be unaware of the legal remedies open to him, and, in Counsel's submission, the onus should be on the respondent and the intervener to demonstrate that they have been prejudiced by delay rather than on the complainant to show cause why this complaint should be considered. Finally, Counsel notes that the complainant is not seeking any financial compensation but merely the restoration of his seniority. If the Board sustains Mr. Daley's complaint, it has considerable flexibility in fashioning a remedy. It could treat the situation as if he had filed a grievance *ab initio*, and determine his rights under the 1976-77 agreement, or it could relieve against any time limitations in that agreement and direct that the matter go before an arbitrator.

18. The union argues that it is too late to resurrect the events of 1976 or to transform what was originally a complaint against Mississauga Transit into a complaint against the union. It was not until months after his resignation that Mr. Daley complained about his loss of seniority — far too late to do much about it. The complainant's termination was regarded at the time as an amicable compromise by all concerned. It was only in retrospect, after he was rehired, that the complainant characterized his treatment as unfair, and his allegations about the quality of union representation were even more belated. In the union's submission, it should not have to defend itself, five years after the fact, in respect of conduct considered unexceptional at the time; nor, at this late date, is it feasible to process a grievance which was never filed or even requested, and which could upset seniority rights entrenched for years.

19. There is no doubt, of course, that the complainant has never been satisfied with the loss of seniority resulting from his termination, but it was not until years later — in February 1981, — that the focus shifted from the employer to the trade union. And even then, the section 89 complaint did not materialize until more than nine months later. The union contends that it is next to impossible to reconstruct meetings and conversations which took place more than five years ago and were not viewed as contentious at the time. No notes were taken of these meetings and conversations, nor was there any early indication that they could be material to future litigation (which might have prompted the parties to reflect upon events and record their recollections of what had transpired). The union reiterates that it was never pressed to file a grievance on the complainant's behalf either at the time of his termination or within a

reasonable period thereafter — nor is it at all evident on what basis a grievance could have been filed. How then, asks the union, can the complainant, long after the fact, now argue that this is what should have been done? The union maintains that it did what it could on behalf of the greivor at the time of his termination and it should not have to defend itself five years later against an ex post facto characterization of its conduct. The union argues that as a matter of labour relations policy, the Board should not entertain five year old claims.

20. It is by now almost a truism that time is of the essence in labour relation matters. It is universally recognized that the speedy resolution of outstanding disputes is of real importance in maintaining an amicable labour-management relationship. In this context, it is difficult to accept that the Legislature ever envisaged that an unfair labour practice, once chrystallized, could exist indefinitely in a state of suspended animation and be revived to become a basis for litigation years later. A collective bargaining relationship is an ongoing one, and all of the parties to it — including the employees — are entitled to expect that claims which are not asserted within a reasonable time, or involve matters which have, to all outward appearances, been satisfactorily settled, will not reemerge later. That expectation is a reasonable one from both a common sense and industrial relations perspective. It is precisely this concern which prompts parties to negotiate time limits for the filing of grievances (as the union and the employer in this case have done) and arbitrators to construct a principle analogous to the doctrine of laches to prevent prosecution of untimely claims. (See *Re C.G.E.* 3 L.A.C. 980 (Laskin); and *Re Oil Chemical and Atomic Workers, Local 9-672 and Dow Chemical of Canada Limited* [1966] 18 L.A.C. 51 (Arthurs)).

21. In recognition of the fact that it is dealing with statutory rights, the Board has not, heretofore, adopted any rigid practice with respect to the matter of delay — holding, in most cases, that it will simply take this matter into account in determining the remedy if a statutory violation is established. However, whatever the merits of this approach, the Board must also keep in mind the potentially corrosive effect which litigation can have upon the parties' current collective bargaining relationship — quite apart from the outcome. Adversarial relationships are pervasive enough in our industrial relations system without the resurrection of ghosts from the past. In the Board's view, the orderly conduct of an ongoing collective bargaining relationship and the necessity of according a respondent a fair hearing both require that unions, employers and employees recognize a principle of repose with respect to claims that have not been asserted in a timely fashion. If such claims are not launched within a reasonable time, the Board may exercise its discretion pursuant to section 89 and decline to entertain them.

22. A perusal of the Board cases reveals that there has not been a mechanical response to the problems arising from delay. In each case, the Board has considered such factors as: The length of the delay and the reasons for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involves retrospective financial liability or could impact upon the pattern of relationships which has developed since the alleged contravention; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to parties who are unaware of their statutory rights or, who, through inexperience take some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances are exceptional or there are overriding public policy considerations, that limit should be measured in months rather than years.

23. The Board has recently had occasion to review its approach to the issue of delay in *Sheller-Globe of Canada Limited*, [1982] OLRB Rep. Jan. 113 — a case which bears some resemblance to the present one, (although there the delay was 2½ years and here it is five). In *Sheller-Globe*, the complainant was discharged in March 1979, and filed her complaint with the Board in October 1981. In between, she had discussions with union and employer officials, she took legal advice (in March of 1979), she filed a complaint with the Human Rights Commission, and in December 1980, she filed a wrongful dismissal action. Finally, two and a half years after the alleged offense, she complained to this Board that her union had not represented her adequately and requested that this Board direct that the propriety of her discharge be considered by a board of arbitration constituted in accordance with the collective agreement in effect at the time her employment was terminated. The Board dismissed the complaint with the following observations:

“13. A delay of the present magnitude carries with it an element of prejudice which is undeniable. Memories fade, and a party’s ability to present a defence will deteriorate for that reason alone. This is particularly true when a party is not on notice that an action against it, requiring the litigation of certain events, remains pending. Here the respondent was justifiably under the impression that the grievance route, or any further demands against the union, had been abandoned in favour of other actions against the company. The lingering discussions which the complainant’s husband had with Mr. Pattison and the stewards were clearly of an amicable nature; they provided no indication that action would subsequently be directed against the trade union itself, so that notes or other forms of evidence could be more actively maintained. The defence of the employer is *not* the defence of the trade union in these proceedings. The Board would be concerned not with the matter of cause for discharge, but rather the steps which the respondent’s officials went through in concluding in their own minds that no grounds for a grievance existed. That defence would turn upon the recollection and credibility of the respondent’s own officials. It might be noted parenthetically that the Labour Board, in administering the *Labour Relations Act*, is primarily concerned with the ongoing labour relations of a workplace, and such workplaces do not remain static over time. The Board as a result has always been conscious of the need for expedition in its practices and procedures. The delay in the present case raises concerns over an appropriate remedy, if the Board *were* to permit this complaint to now proceed, which are not fully answered by the complainant’s concession as to damages. In circumstances such as the present, the onus shifts to a complainant to satisfy the Board that there are compelling labour relations reasons to cause the Board to exercise its discretion and entertain the complaint under section 89.

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15. In the present case, the delay has indeed been “extreme”, and the factors put forward by the complainant are insufficient to deliver her from the consequences of that delay. Certainly the Board has no quarrel with the notion of an aggrieved individual investigating other avenues of

redress prior to launching a section 68 application with the Board. But a point is reached, after a reasonable period of time, when the individual must decide whether it is going to go against the trade union or not, and if so, then overt steps must be taken in that direction. The individual cannot rely indefinitely on the efforts being taken on his or her behalf in other directions, and then come back against the trade union when those efforts prove fruitless. The important point to note here is that the other forms of action being pursued by the complainant were directed solely against the employer. Not a word was said to the trade union during that period to indicate that its conduct was being viewed as unlawful, or that its own position might still be placed in jeopardy. The complainant will not now be permitted, at this date, to use section 68 against the trade union as a last resort to reach the employer."

24. As I have already noted, the complainant did not challenge his termination at the time it occurred. He resigned. He did not press the union to grieve on his behalf. The matter was not raised again until some months after he was rehired. He did not go the Human Rights Commission (where there was no allegation against the union) until some months after that. From January 1978 until the summer of 1979, there is little indication that he did anything to assert to his position other than, perhaps, (the facts upon which the parties agreed were not clear on this point) writing to certain municipal officials. Certainly, there was no allegation against his trade union. The complainant consulted a solicitor in March 1980, who afterwards arranged certain meetings on his behalf; but it was not until eleven months after this initial contact that the union was informed of a *possible* section 68 complaint, and it was not until nine months after that, that his complaint actually materialized. The delay has been extreme, and in the Board's view, it is both unreasonable and entirely unjustified.

25. The complainant is not seeking financial compensation. He could not reasonably do so in the circumstances. But the complainant is seeking a direction either that this Board will arbitrate a grievance itself, or that a grievance which he never wished to file at the time should be taken before an arbitration board under a collective agreement which expired some years ago. Even stating that alternative reveals its problems. It is said that the employer is indifferent as to the matter of the complainant's seniority, and the Board could simply direct the union to agree to a reordering of the seniority list. But to do that would significantly alter the complainant's rights in a number of situations vis-a-vis other employees in the bargaining unit — a result which could put him in a better position than he would have been in if he had asked the union to take a grievance on his behalf in 1976 and the union had done so. And whether this Board arbitrates Mr. Daley's grievance or it is sent to an arbitrator (with a suitable order relieving against time limits) the effect would be to put in issue the seniority rights of a number of other employees which have been unchallenged and acted upon for several years.

26. In all the circumstances of this case, the Board considers it appropriate to exercise its discretion under section 89 not to inquire into the complainant's allegations. It is simply too late. The application is therefore dismissed.

2311-81-M United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Applicant, v. The Electrical Power Systems Construction Association and **Ontario Hydro**, Respondents

Construction Industry Grievance – Jurisdictional Dispute – Practice and Procedure – Collective agreement requiring submission of jurisdictional disputes to IJDB – Grievance filed having jurisdictional overtones – Whether Board entertaining grievance

BEFORE: R. A. Furness, Vice-Chairman, and Board Members C. A. Ballentine and W. G. Donnelly.

APPEARANCES: *L. C. Arnold and G. Meservier for the applicant; Ross Dunsmore and Phil Gauthier for the respondents.*

DECISION OF THE BOARD; March 4, 1982

1. The applicant has referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding determination.
2. The grievance arises under the provisions of the Ontario Provincial Power Sector collective agreement (the "collective agreement") by and between The Electrical Power Systems Construction Association (the "Association") on behalf of Ontario Hydro and all other contractors performing work in the electrical power systems sector and the applicant. This collective agreement came into effect on May 1, 1980, and remains in effect until April 30, 1982.
3. The text of the grievance is set out in a letter dated February 5, 1982, from the applicant to the respondents and which states:

Please be advised that we have been retained on behalf of the U.A. in connection with an alleged violation by Ontario Hydro of the above referred to Collective Agreement, and in particular Article 6 thereof.

MATERIAL FACTS

Ontario Hydro has failed to assign the work of the handling and installation of the auxiliary boiler and associated equipment at Thunder Bay Generating Station (the work) to Members of the U.A., and has thereby violated the Collective Agreement, and in particular Article 6 thereof.

The U.A. alleges that Ontario Hydro has failed or refused to apply the terms and conditions of the Collective Agreement in assigning the Work, in that it has failed or refused to assign the work in accordance with the procedures established by the Impartial Jurisdictional Disputes Board as required by Article 6 of the Collective Agreement.

The U.A. alleges that if Ontario Hydro had followed such procedures the work would have been assigned to Members of the U.A., rather than to members of the Ironworkers Union.

The Union alleges that the Impartial Jurisdictional Disputes Board procedure requires that work be assigned in accordance with decisions of record or agreements of record. The only decision or agreement of record consists of a Decision of Record, dated October 3, 1923, which unequivocally requires The Work to be assigned to Members of the U.A.

REMEDIES

The Union, therefore, seeks the following remedies:

1. A Declaration that Ontario Hydro has failed to apply the procedures of the Impartial Jurisdictional Disputes Board when assigning The Work, and has thereby contravened the Collective Agreement and in particular Article 6 thereof.
2. A Direction that Ontario Hydro comply with the procedures of the Impartial Jurisdictional Disputes Board as required by the said Article 6 of the Collective Agreement.
3. A Declaration that in applying such procedures The Work should be assigned in accordance with the Decision of Record of October 3, 1923, and in consequence should be assigned to Members of the U.A.
4. The Union seeks damages arising out of the violation of the Collective Agreement by Ontario Hydro as aforesaid.

Please be advised that this Grievance is being referred to the Ontario Labour Relations Board pursuant to Section 124 of the Ontario Labour Relations Act.

Article 6 of the collective agreement provides:

Article 6 WORK ASSIGNMENT

6.1 The jurisdiction of the Union shall be that jurisdiction established by agreements between International Unions claiming the work or decisions of record recognized by the AFL-CIO for the various classifications and the character of the work performed.

6.2 In recognition of the Union's jurisdictional claims, it is understood that the assignment of work and the settlement of jurisdictional disputes with other Building Trades organizations shall be adjusted in accordance with the procedure established by the Impartial Jurisdictional Disputes Board, or any successor agency of the Building and Construction Trades

Department. When a jurisdictional dispute exists between unions and upon requests by the United Association, the Employer shall furnish the U.A. director of Canadian Affairs a signed letter from a duly authorized official of the company on Employer stationery, stating whether or not the Union was employed on specific types of work on a given project. The Employer agrees to consider evidence of established practices within the industry when making jurisdictional assignments.

6.3 When there is a dispute as a result of a pre-job mark-up, the Employer will make an assignment only after:

(i) evidence has been submitted by the unions involved within a time limit specified by the Employer;

(ii) all evidence submitted has been evaluated by the Employer.

A copy of such assignments shall be submitted to the U.A. Canadian Office. Where a local of the Union is in disagreement with an Employer's work assignment, the U.A. Canadian Office can submit the dispute in accordance with section 6.2 above and the Employer shall supply the U.A. Canadian Office with a copy of the evidence submitted by the other union(s) involved along with drawings and/or prints plus a description of the work or process in dispute from a qualified representative of the Employer when requested.

6.4 The International Representative of the Union will advise the Association in writing of his intent to submit a jurisdictional dispute to the Impartial Jurisdictional Disputes Board and will identify in detail the work in question. The decision of the Impartial Jurisdictional Disputes Board will be final and binding to the parties to this Agreement.

6.5 There shall be no sit down or work stoppage because of jurisdictional disputes.

6.6 In the event that the Impartial Jurisdictional Disputes Board for the Construction Industry fails to render a decision within sixty (60) days of the disputed assignment, the Association and the Unions shall have recourse to the Ontario Labour Relations Board for a decision.

6.7 In the event the building trades in the Province of Ontario are successful in establishing a Provincial Impartial Jurisdictional Disputes Board, the Association and the Union agree to meet and discuss implementation of procedures set forth by said Board.

5. The applicant argued that the Board ought to entertain this grievance because Ontario Hydro has failed to consider evidence of established practices within the industry when making the jurisdictional assignment as required by Article 6.2 of the collective agreement. The applicant characterized its grievance as a preliminary issue to any assignment of work and which requires resolution prior to adjustment in accordance with the procedure

established by the Impartial Jurisdictional Disputes Board (the "IJDB") or any other successor agency of the Building and Construction Trades Department. The applicant conceded that there are two aspects to this grievance, namely, the refusal by Ontario Hydro to assign certain work to it and, secondly, the dispute between the parties over the interpretation of Article 6.2 of the collective agreement. The applicant concedes that while the first aspect of grievance has jurisdictional overtones, the second aspect does not contain jurisdictional overtones and involves the interpretation of the language of a collective agreement.

6. The respondents argued that the Board does not have jurisdiction to entertain the alleged grievance because the applicant has alleged a violation of the jurisdictional dispute article of the collective agreement. The respondents referred to the provisions of Article 6 as providing a method of resolving jurisdictional disputes before the IJDB. In these circumstances, it was the position of the respondents that the Board does not have jurisdiction to entertain the alleged grievance and that the proper recourse is for the applicant to adjust its jurisdictional claims before the IJDB.

7. The Board is of the opinion that notwithstanding the jurisdictional overtones to this grievance, the applicant is entitled to have the interpretation to be given to the language of Article 6.2 of the collective agreement by the Board pursuant to the provisions of section 124 of the Act. However, the Board agrees with a previous decision of this Board (involving similar issues in an application made under the provisions of section 124) that once the issue of the interpretation to be given to certain language has been determined, aspects of the grievance may give rise to a jurisdictional dispute. See Board decision 1560-81-M, dated December 10, 1981 (unreported). When that point has been reached the Board would be prepared to consider representations as to whether the Board has jurisdiction to continue to entertain this application.

8. The Registrar is directed to list this matter for continuation of hearing.

2166-81-R Peterborough Typographical Union Local 248 (I.T.U.), Applicant, v. **Peterborough Examiner** a Division of Canadian Newspaper Company Limited, Respondent, v. Group of Employees, Objectors

Bargaining Unit – Whether editorial staff included in office unit – Whether having separate community of interest – Board policy on printing and newspaper industry units reviewed

BEFORE: M. G. Picher, Vice-Chairman and Board Members J. Wilson and C. A. Ballentine.

APPEARANCES: *M. Cornish, D. Esposti, R. Earles, Dan Cannon, J. McAllister, J. Kerr and D. Sheldon for the applicant; M. Patrick Moran, Bill Ryrie and Bruce Rudd for the respondent; David G. MacDonald and Barbara I. Hanley for the objectors.*

DECISION OF THE BOARD; March 18, 1982

1. This is an application for certification.

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3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

4. The parties are not agreed as to the bargaining unit or units in this application. The respondent, which operates a daily newspaper, initially submitted that the appropriate bargaining structure should be four units of full-time employees:

- 1) Advertising Department employees
- 2) Administration and Business office employees
- 3) Circulation Department employees
- 4) Editorial Department employees

At the time of the application there were two pre-existing bargaining units of pressmen and composing room employees.

5. The union's request is for a single bargaining unit of full-time employees except those in the two pre-existing bargaining units.

6. After some discussion between the parties, with the assistance of a Labour Relations Officer, the respondent reduced its position to three bargaining units:

- 1) Office and clerical employees
- 2) Sales employees
- 3) Editorial department employees

The union continued to prefer a single bargaining unit. It advised the Board, however, that to avoid the delay of examinations it would accept two bargaining units as an alternative, namely:

- 1) Office, clerical and sales employees
- 2) Editorial department

7. The parties made their submissions directly to the Board as to the material facts. They are not in substantial dispute. The only issues outstanding apart from the bargaining unit structure were the employment status of Ms. Barbara J. Blackbourn who is described as a payroll clerk and who the respondent maintains is confidentially employed in relation to labour relations matters, and a petition filed in opposition to the application.

8. The structure of bargaining units in the newspaper industry has been the subject of comment in a recent Board case. The Board has had a growing concern for the undue fragmentation of bargaining in the newspaper and printing industry, particularly in light of the disappearance of the traditional printing crafts. In *The Spectator*, [1981] OLRB Rep. Aug. 1177 the Board made the following observations:

As a general practice the Board does not grant certification on a departmental basis. For historical reasons exceptions were made in the newspaper and printing industry. Those industries were traditionally organized by craft unions at a time, long pre-dating the existence of this Board, when the printing trades were distinguished by specialized skills that gave rise to clear distinctions along craft lines. (See, Zerber *The Development of Collective Bargaining in the Toronto Printing Industry in the 19th Century* (1975) 30 IR/R183. From its earliest days the Board granted certificates in the newspaper industries reflecting the traditional craft designations. (See, e.g. *The Ottawa Citizen*, [1944] OLRB Rep. Aug; *The Star Publishing Company of Windsor, Limited*, (1945) CLLC #10,424. The traditional preponderance of craft units in the newspaper industry tended to produce more fragmented bargaining structures than would be encountered in other industrial settings. That may explain why, over the years, the Board often acceded to the agreement of the parties to departmental units of employees who did not possess craft skills. Generally in an industrial setting the Board would, apart from any special craft units, contemplate a breakdown of employees for collective bargaining purposes into office and clerical employees on the one hand and production employees on the other. When a plant is substantially organized along those lines any union seeking to obtain certification for a departmental unit is normally required to take a tag end unit of all unorganized employees. The obvious reason is to avoid undue fragmentation in collective bargaining.

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In the past twenty years the newspaper industry has seen some fast moving and dramatic technological change in its methods of production.

(See, generally Baker, *Printers and Technology* (1957, Columbia University Press, New York); Kelber and Schlesinger, *Union Printers and Controlled Automation* (The Free Press 1967, New York); Rogers and Friedman, *Printers Face Automation* (Lexington Books, 1980, Lexington Mass.)) The movement of newspaper printing processes from hot lead to cold metal and to still more modern computerized word processing and photo-printing equipment has already spawned complex jurisdictional disputes at a number of Canadian newspapers (including LaPresse, The Pacific Press and The Toronto Star; see, the *Toronto Star Newspapers Limited*, [1979] OLRB Rep. May 451; *Toronto Star Newspapers Limited*, [1980] Rep. April 565 and 566). Labour Boards have been forced to become increasingly cognizant of the collective bargaining ramifications of these developments in the newspaper and printing industry and have been required to fashion decisions responsive to the emerging reality.

In a recent decision the National Labour Relations Board had occasion to consider the bargaining unit appropriate in a newspaper transformed by recent technological change. (*Leaf-Chronical Company*, (1979) 244 NLRB 1104; 102 LRRM 1306). In that case the employer maintained that the Board's traditional practice of granting departmental units should be followed and that the composing room, camera room, press room and mailing room should be separated into individual bargaining units. It also requested a separate multi-location editorial or news department bargaining unit. After closely examining the facts the NLRB noted that there had been a substantial blurring of craft lines in the newspaper's operations. It noted that the only skill required in the composing room was typing and that there were no skill or experience prerequisites for employment in any other of the production departments. The Board also remarked that the merger of the Mailer's Union with the Typographers (I.T.U.) further blurred traditional craft lines. Applying normal considerations of community of interest the Board concluded that two bargaining units were appropriate, one being a comprehensive unit including all mechanical department employees of the newspaper and the second being composed of all newsroom and editorial employees.

We see no reason why, in a similar case, this Board should arrive at any different conclusion. When the employees of a newspaper or printing shop perform discernable craft skills and an established craft union applies to represent them in collective bargaining the overriding policy of the Act, expressed in section 6(2), is that the value of special representation overrides the disutility of fragmentation. On the other hand, where employees do not exercise technical skills or perform craft work which meaningfully distinguishes them from other employees there should be no presumption in favour of fragmentation. In future applications in the newspaper and printing industry, therefore, where it does not appear on the evidence that the preconditions to the certification of a craft unit are made out the Board will be open to submissions for the structuring of

bargaining units on the basis of normal considerations of community of interest. There should no longer be any presumption that non-craft bargaining units will be structured by department; without limiting the direction in which the Board may wish to take in any given case we see no reason why in the newspaper and printing industry, apart from the establishment of legitimate craft units, the representation of employees for collective bargaining purposes should be any less comprehensive than in other industries. Where the evidence discloses a separate community of interest among all office and clerical employee, all mechanical production employees and all editorial or newsroom employees bargaining units should be fashioned accordingly.

9. In the instant case the production employees of the respondent already have collective bargaining in two separate units of seven pressmen and thirteen composing room employees. To accede to the employer's position would create a total of three more bargaining units, including an editorial staff unit of twenty, a sales staff unit of thirteen and an office staff unit of thirteen employees. That would be in addition to any further unit or units of part-time employees that might be established in the future. We must have obvious concerns with bargaining units that are so fractioned.

10. On the basis of the material before us and the representations of the parties we are not, however, persuaded that a single bargaining unit is appropriate in the circumstances of this case. In a small newspaper where employees perform a range of functions, or where the number of employees in separate editorial, clerical and production units might be too small to generate an effective bargaining presence, a different result might obtain. In those circumstances employees in the various departments of a newspaper may be seen by the Board as having a sufficient community of interest to bargain as a single unit. Where, however, office, clerical and sales employees on the one hand, and editorial staff on the other hand, are found in numbers sufficient to establish viable bargaining structures that can adequately represent their separate interests the Board will be open to separate units along the lines suggested in *The Spectator*. As the NLRB approach and the history of collective bargaining for journalists in Canada suggest there is substantial precedent for editorial staff bargaining as a separate unit in appropriate circumstances (see generally, *Royal Commission of Newspapers, Volume 5, Research Publications, "Labour Relations in the Newspaper Industry" (1981) (The Kent Commission)*).

11. In our view the twenty employees in the editorial staff constitute a unit appropriate for collective bargaining. We do not, however, believe that collective bargaining would be well served by severing the sales staff from the office and clerical employees. Given the similarity of function and interest among these employees we are satisfied that they can successfully bargain as a single unit and that it is preferable that they do so as a body of twenty-six employees rather than as two separate groups of thirteen. The Board therefore finds the two following units of employees to be appropriate for collective bargaining purposes:

Bargaining Unit #1

All employees in the editorial department of the respondent whose head office is in Peterborough, Ontario, save and except the managing editor, city editor, news/wire editor, editorial page editor, persons regularly

employed for not more than twenty-four hours per week and students employed during the school vacation period.

Bargaining Unit #2

All employees of the respondent whose main office is in Peterborough, Ontario, save and except advertising manager, classified manager, publisher, business office manager, circulation manager, confidential secretary to the publisher, editorial department, persons covered by a subsisting collective agreement, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.

12. A numerically relevant petition was filed in respect of bargaining unit #1. No direct evidence having been adduced in respect of the single overlapping signature, the Board ruled at the hearing that no weight could be given to the petition.

13. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in bargaining unit #1 at the time the application was made, were members of the applicant on January 27, 1982, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

14. A certificate will issue to the applicant with respect to bargaining unit #1.

15. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in bargaining unit #2 at the time the application was made, were members of the applicant on January 27, 1982, the terminal date fixed for this application and the date which the Board determines, under section 102(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

16. Interim certification hereby issues to the applicant under section 6(2) of the Act with respect to bargaining unit #2.

17. A Board Officer is appointed to inquire and report back to the Board on the duties and responsibilities of Barbara Blackbourn, described by the respondent as payroll clerk.

1867-81-M International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Union 128, Applicant, v. **Proweld Company Limited**, Respondent

Construction Industry Grievance – Whether employees discharged for just cause – Whether warning or opportunity to explain required – Extent to which arbitral jurisprudence on discharge applies to construction industry

BEFORE: R. D. Howe, Vice-Chairman, and Board Members S. Cooke and W. H. Wightman.

APPEARANCES: *Paul Cavalluzzo, Susan Ballantyne and Frank Young for the applicant; Brian P. Smeenck and for the P. Krywy for the respondent.*

DECISION OF THE BOAR; March 17, 1982

1. This is a referral of a grievance to the Board pursuant to section 124 of the *Labour Relations Act*.

2. The grievance alleges that the respondent violated the collective agreement that was binding upon the parties at all material times, by “laying off” Ian Williams and Charles Duffy (the “grievors”) on October 15, 1981 “after one day’s work”. In its reply, the respondent alleged that the grievors were incompetent in the performance of their assigned duties, that they worked in an unsafe manner, and that they were “discharged for just cause”.
(*Extensive review of evidence omitted*)

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14. Peter Krywy has been the President and owner of the respondent since 1966 and has over thirty years’ experience as a boilermaker. During October of 1981 his company was involved in cutting and dismantling two large oil storage tanks at the Ultramar Canada Inc. (“Ultramar”) bulk terminal in Port Stanley, Ontario, for shipment to Toronto and re-erection at a site of Finch Avenue.

15. Although Mr. Krywy had given the grievors no warning whatever that they were not working fast enough to satisfy him, much less that their jobs were in jeopardy, at approximately 3:15 that afternoon he told them that they “wouldn’t be back” because they were “too slow in putting up the scaffolding”. Prior to telling the grievors that they “wouldn’t be back”, Mr. Krywy did not give the grievors any opportunity to explain why the erection of the scaffold was taking so long to complete. Mr. Krywy also told them that the job was costing him “84¢ a minute” and that a crew employed by him on another site had put up a similar scaffold in “three or three and a half hours”. Mr. Williams, who was quite angry about being “fired”, told Mr. Krywy, “Well those are the guys you should have hired to do this.”

16. If the grievors had been more experienced in tank dismantling, they would undoubtedly have known that the best way of getting most of the scaffold components into the tank was to carry them through the manway. However, the alternate technique which they adopted due to their inexperience resulted in a delay of at most one hour in the erection of the scaffold.

17. The grievors' failure to observe the normal safety procedures of installing horizontal bracing on the scaffold as soon as possible has caused the Board some concern. The grievors' explanation that they intended to install the required bracing once they had "righted" the scaffold does not justify their failure to follow the normal safety procedure. It may be that it was not improper for the horizontal bracing to have been absent at that point in time from the fourth stage since the grievors were in the process of erecting that stage. However, the evidence indicates that the horizontal bracing at the first stage should have been installed by that time. Although the grievors' failure to observe that safety requirement constituted a legitimate cause for concern on the part of their employer, it would not by itself justify the discharge of the grievors without any warning. Moreover, having regard to all of the evidence, the Board is satisfied that the grievors were not discharged for a failure to work safely but rather for failure to erect the scaffold with sufficient speed to satisfy Mr. Krywy.

18. Although the grievors' lack of experience with the scaffolding in question may have resulted in their erection work being somewhat slow, we accept their evidence that the slope of the floor, the corrosion or paint on the wing nuts, and the poor fit of the braces going around the top of the rail also reduced the speed at which the scaffold could be erected. In any event, even if it is assumed that the grievors were unduly slow in erecting the scaffold, that does not justify their precipitate discharge without any prior warning. Although clause 4:02 of the collective agreement provides that the employer "shall have the right to determine the competency and qualifications of its employees", that right is subject to the limitation that an employee can only be discharged for "just and sufficient cause".

19. The arbitral jurisprudence with respect to the necessity of warning an employee of management's dissatisfaction with his speed or quality of performance is summarized as follows in Brown and Beatty, *Canadian Labour Arbitration* (Agincourt: Canada Law Book Limited, 1977) at paragraph 7:3542:

"Although it has been suggested that the employer is not required to warn an employee of its dissatisfaction with his work performance in those instances in which he is terminated or otherwise dealt with in a non-disciplinary manner, the majority of arbitrators who have considered the issue have expressly or implicitly rejected this point of view. Indeed, when read together with some of the more recent awards dealing with incapacitated employees generally, it would appear that in all instances of substandard work performance, whether voluntary or involuntary, the employer should first apprise its employees of any deficiencies it perceives in their work habits. That is, while recognizing that formally admonishing or warning an employee that unless his performance improves further and more severe action will result, may in certain circumstances be neither appropriate nor required, nevertheless arbitrators have recognized that only if the employer communicates and advises of its concern will an employee have the knowledge necessary to induce him to seek whatever assistance is available to enable him to improve his performance."

20. As has been noted in the arbitral jurisprudence, generally the employer-employee relationship in the construction industry is not a close one and is not comparable with relationships that arise between long-standing employers and employees in the industrial

context (see, for example, *Re Stearns-Roger Canada Ltd. and Millwrights Union Local 2736 (No. 2)* (1972), 2 L.A.C. (2d) 103 (Lindholm)). However, we are not persuaded that either the arbitral jurisprudence or the language of the collective agreement that is before us for interpretation in the present case requires us to apply to the discharges in question considerations that are *totally* different from those applied by arbitrators to employers in other industries. In particular, the Board is of the view that the respondent was required to warn the grievors that their jobs were in jeopardy prior to discharging them for “unsatisfactory” performance in the circumstances of this case. (Different considerations may well apply in situations involving such matters as blatant incompetence, conduct which seriously endangers employee health or safety, or grievous misconduct.) In *Re Harold R. Stark Ltd. and United Association of Journey-men & Apprentices of the Plumbing & Pipe Fitting Industry* (1972), 1 L.A.C. (2d) 406 (Egan), the majority wrote (at pages 406-407):

“It was argued by the company that because of the special nature of the construction industry, different considerations ought to apply with respect to the discharge of employees to those obtaining in industry in general. In this regard, it is of some significance to note that the grievors are not in the position of long-term employees whose previously acceptable work performance has deteriorated. The grievors were assigned to the company by the union under the terms of the collective agreement. That is, of course, an arrangement quite common in the construction industry. In consequence of this practice, the grievors were taken on without any pre-hiring or qualifying interview such as might enable the company to make a pre-employment assessment. They entered into the employment of the company purporting to be competent tradesmen and were not subject to any probationary period of evaluation by the company. Therefore, there is no question of any knowledge, on the part of the company, as to the proficiency of the grievors at the time of their engagement as tradesmen qualified in the classifications which they hold.

We are not wholly persuaded, however, that totally different considerations from those applied to industry in general are applicable to discharge cases in the construction industry. In this connection, our attention was drawn to *Re United Ass’n of Journeymen & Apprentices of the Plumbing & Pipefitting Industry, Local 221, and Fraser-Brace Engineering Co. Ltd.* (1968), 19 L.A.C. 258 (Christie). This case involved the question of the discharge of an employee for ‘loafing’ on a construction site. The company, in that case, argued that different considerations applied to discharge in the construction industry. The board, in its decision in that case, stated that it was not unimpressed by the argument that rather different considerations may apply in the determination of what constitutes just cause for dismissal in the construction industry.

The grievor in the *Fraser-Brace* case, *supra*, appears to have been a chronic time waster, but received no admonitions from the company with respect to this conduct prior to his discharge. The board went on to say, however, that ‘It is unnecessary to decide what differences it makes that we are dealing with the construction industry. Even if the requirements of

'cause' and just cause were considerably lower than they are in general industrial situations 'cause' for dismissal was not established here.' The board went on to find that the discharge was unjust because of the absence of a warning and reinstated the grievor."

See also *White and Greer Company Limited*, Board File No. 1404-81-M, decision dated Nov. 23, 1981, unreported, in which the Board confirmed the propriety of requiring a warning prior to the discharge of an employee by employer in the construction industry for lack of production.

21. Although it was contended on behalf of the respondent that the grievors were discharged for incompetence, it is clear from the evidence of Mr. Krywy that he was of the view that the grievors also engaged in some culpable conduct, namely, loafing on the job. The alleged presence of conduct that could be subject to a corrective response underlines the propriety of requiring a warning prior to discharge of the grievors in the present case. If the grievors had in fact been loafing, then a warning would have served to notify them that a failure to improve their unsatisfactory performance would result in the termination of their employment. Moreover, where, as in the present case, the grievors were not loafing, a warning from Mr. Krywy concerning his dissatisfaction with their speed would have provided them with an opportunity to relate to him the difficulties that they were experiencing in their efforts to erect the scaffold. Such information would have assisted Mr. Krywy in making a more informed assessment of the grievor's efforts and might also have prompted him to draw upon his extensive experience to suggest potential means of overcoming those difficulties.

22. Having regard to all of the evidence and the submissions of the parties, the Board finds that the respondent violated the collective agreement by discharging the grievors without "just" or "sufficient" cause. The Board further finds that it was originally the intention of the respondent to employ the grievors not only at the Ultramar site at Port Stanley, but also at the Ultramar site in Toronto. Moreover, we are satisfied that the grievors were capable of performing at least some of the work which the respondent had to perform at the Toronto site (including welding which could be performed by Mr. Duffy, who has his "welders's ticket"). Accordingly, the grievors are entitled to full compensation for all lost wages and benefits sustained by them as a result of the respondent's breach of the collective agreement from the date of their discharge to the date that the respondent completed the work at the Ultramar site in Toronto which the grievors were capable of performing. However, it would not be appropriate to direct the respondent to reinstate the grievors since it appears that the respondent's Ultramar contract has been completed.

23. The Board therefore orders:

- (1) that Ian Williams and Charles Duffy be fully compensated by the respondent for all lost wages and benefits sustained through the respondent's breach of the collective agreement; and
- (2) that the respondent pay interest on the compensation for lost wages ordered by the Board, such interest to be calculated in the manner described in Practice Note No. 13 dated September 8, 1980.

24. The Board remains seized of this matter in the event that a dispute arises concerning the implementation of the Board's order.

0791-80-U Ontario Nurses' Association, Complainant, v. The St. Catharines General Hospital, Respondent.

Interference in Trade Unions – Unfair Labour Practice – Registered nurse President of Local Union – Publicly criticizing hospital's staffing arrangements – Falsely linking death of patient to inadequacy of staff – Hospital reporting grievor to College of Nurses – Whether grievor's activity in making public statements protected activity under Act – Discussion of degree of protection for public statements by union officials – Whether complaint to College motivated by anti-union considerations

BEFORE: George W. Adams, Q.C., Chairman, and Board Members J. A. Ronson and B. L. Armstrong.

APPEARANCES: *Donald F. O. Hersey and Susan A. Bisset for the complainant; and D. I. Wakely, A. Craig, M. Low, and E. N. Featherstone for the respondent.*

DECISION OF GEORGE W. ADAMS, Q.C., AND J. A. RONSON; March 16, 1982

1. This is a complaint filed under section 89 of the *Labour Relations Act* alleging violations of section 64, 66 and 70 of the Act. The grievor, Mrs. Cathryn Mancini, is a registered nurse, and, at the time of the incident giving rise to the complaint, was president of Local 26 of the complainant association. The complainant alleges that the respondent hospital filed an unsubstantiated complaint against the grievor with the College of Nurses of Ontario (hereinafter "the College") because the grievor spoke to the press about the alleged failure of the respondent to implement certain staffing recommendations of an Assessment Committee constituted under the collective agreement between the association and respondent. The complainant submits that the grievor's actions at a press conference called by the complainant on or about June 18, 1980, amounted to protected activities under the *Labour Relations Act* and that the respondent sought, by reporting the grievor to the College, to interfere with such protected activity.

2. The respondent submits that at the aforesaid press conference the grievor improperly linked the staffing arrangements at the hospital with the death of a patient in order to sensationalize the staffing issue and advance the demands of the complainant concerning this issue on Community Ward 5 of the hospital. The respondent submits that the grievor's statements to the press were without substance; that they were made without proper investigation; and that they caused damage to the respondent's reputation as a community resource. The respondent further submits that it believed the grievor's actions constituted professional misconduct as defined by section 21 of Ontario Regulation 578-75 made pursuant to section 74(h) of the *Health Disciplines Act* S.O. 1974, c. 47, as amended and that, on the basis of this belief, Marion Low, the Director of Nursing of the respondent, informed the College of the actions of the grievor. The respondent is a 450 bed hospital in the City of St. Catharines. It employs 250 registered nurses and a total nursing staff of 450.

3. Marion Low has been Director of Nursing for the respondent since 1974 and a nurse since 1948. She admitted writing the following letter dated July 4, 1980 to the College concerning the grievor:

"Miss Joan C. MacDonald,
Director,
College of Nurses of Ontario,
600 Eglinton Avenue, East,
Toronto, Ontario.
M4P 1P4

Dear Miss Macdonald:

Re: Mrs. Cathryn Martha Mancini,
Reg. No.: 75-3397-9

On Wednesday, June 18, 1980, at a press conference called by the Ontario Nurses' Association to publicize a dispute between The St. Catharines General Hospital and O.N.A., Mrs. Mancini, as President of O.N.A. Local 26, made certain statements concerning the care of a patient by the Hospital. These statements were recorded and repeated a number of times in various radio reports.

We contend that:

- a) These statements had no basis in fact.
- b) Mrs. Mancini had been told this on two different occasions prior to her making these statements. At a meeting on Monday, June 16, 1980, attended by representatives of the Hospital and O.N.A. Local 26, at which Mrs. Mancini and Miss Anne Gribben, Executive Director of O.N.A., were both present, it was stated that the situation described was inaccurate and yet in spite of this, Miss Gribben too supported Mrs. Mancini in her statement to the news media.
- c) In spite of having been so advised, these statements were made to dramatize an alleged situation which the Association felt existed at the Hospital.
- d) Mrs. Mancini had no personal knowledge of the incident and could not name the patient involved when questioned both before and after the press conference.
- e) As a result of these actions, the listening and reading public could have been left with the impression that the Hospital was consciously ignoring its responsibility regulating safe patient care.

Mrs. Mancini's actions are considered by us to be professional misconduct as defined in the Ontario Regulation 587/75 (Nursing) under The Health Disciplines Act 1974, as amended to O. Reg. 719/78, September 1979; page 6, article 21(m).

Documentation is available to support the above statements.”

Section 21(m) of O.R. 578/75 provides:

21. For the purposes of Part IV of the Act, “professional misconduct” means,

(m) Conduct or an act related to the performance of nursing services that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable, or unprofessional.

Article 33 of the collective agreement between the complainant and respondent is entitled ‘Professional Responsibility’ and provides:

33.01 In the event that the Employer assigns a number of patients or a workload to an individual nurse or group of nurses such that she or they have cause to believe that she or they are being asked to perform more work than is consistent with proper patient care she or they shall:

- (a) (i) complain in writing to the Nurse-Management Committee within five calendar days of the alleged improper assignment. The Chairman of the Nurse-Management Committee shall convene a meeting of the Nurse-Management Committee within ten calendar days of the filing of the complaint. The Committee shall hear and attempt to resolve the complaint to the satisfaction of both parties.
- (ii) failing resolution of the complaint within five calendar days of the meeting of the Nurse-Management Committee the complaint shall be forwarded to an independent assessment committee composed of three registered nurses; one chosen by the Ontario Nurses’ Association, one chosen by the Employer, and one chosen from a panel of four independent registered nurses who are well respected within the profession. The member of the committee chosen from the panel of independent registered nurses shall act as chair-person.
- (iii) the assessment committee shall conduct a hearing into the complaint within fourteen calendar days of its appointment and shall be empowered to investigate as is necessary to properly assess the merits of the complaint. The assessment committee shall report its findings in writing to the parties within fourteen calendar days following completion of its hearing and investigation and shall forward a copy of its report to the medical advisory committee.
- (b) (i) the parties shall meet within fourteen days of the release of this award and select a panel of four independent registered nurses who are well respected within the profession. The members of

the panel shall sit in a rotation agreed upon by the parties. If a panel member is unable to sit within the time limit stipulated the panel member next scheduled to sit will be appointed by the parties. If the parties are unable to agree upon the composition or rotation of the panel within sixty days of the release of this award, these matters shall be remitted to this Board of Arbitration for determination.

- (ii) each party will bear the cost of its own nominee and will share equally the fee of the chairperson and whatever other expenses are incurred by the Assessment Committee in the performance of its responsibilities as set out herein.

For a background to the insertion of this provision into hospital collective agreements reference should be made to *Mount Sinai Hospital and Ontario Nurses' Association*, Interim Award, May 31, 1977 and Final Award, August 12, 1977 (Burkett); and Swan, *Professional Obligations, Employment Responsibilities and Collective Bargaining*, Industrial Relations Centre, Queen's University at Kingston, Reprint Series No. 46 (1979).

4. The respondent received a complaint under the said article by nurses working on the patient care unit, Community 5, concerning the alleged inadequacy of staffing arrangements to meet essential patient care requirements. At the time Community 5 consisted of a 5 bed intensive care unit (ICU); a 4 bed coronary care unit (CCU); an 8 bed day care surgery unit; and a 26 bed medical/surgery floor. The complaint related to events arising during the period of October 25-31, 1978. The Assessment Committee constituted under the collective agreement reported February 26, 1979. The report notes that "the action taken by nurses marked the first time in Ontario nursing that the collective bargaining structure had been used to adjudicate claims that staffing and work-load decisions endangered patient care including compromised professional integrity". It further points out that its recommendations were not intended to be "blueprints" but rather "a stimulus for reflection and action and a fresh viewpoint from which to approach the problems on the unit". Because the recommendations in the report bear on the incident and surrounding events with which this Board is concerned, the following portion of the report is reproduced:

PART III

FINDINGS AND RECOMMENDATIONS CONCERNING COMMUNITY 5

The conclusion of the Nursing Assessment Committee is that prevailing circumstances on Community 5 during the period, October 25 - 31, 1978, placed some patients at considerable risk and created a dilemma for nursing staff regarding their professional obligations and responsibilities. However, the Committee wishes to point out that the taxing patient care loads carried by nurses on Community 5 at this time, especially by those in the ICU and CCU during the evening and night shifts, were managed conscientiously and with considerable skill.

In the view of the Committee, the difficulties during the week in question stemmed mainly from the immediate organization of the work environment and staffing arrangements. The most pressing problems concerned staffing on the 7 bed ICU, the 4 bed CCU, and the 8

bed care surgery unit. On the basis of the evidence at hand, the Committee believes that these difficulties still exist on Community 5 and still pose threats to patient safety.

Safety of Patient Care

Among the staffing problems identified by the Committee as endangering patient safety in the ICU, CCU and day care surgery unit were:

- the allocation of only two registered nurses to the ICU on the evening and night shifts to care for seven critically ill patients;
- the failure to ensure that patients in the ICU or CCU requiring ventilatory assistance had a registered nurse in attendance at all times;
- the failure to provide for constant surveillance of the cardiac monitoring console in the CCU;
- the habit of leaving post-anaesthetic patients in the day care surgery unit unattended at various times such as the supper hour.

These staffing problems are exacerbated by the practice of drawing the nucleus of the hospital cardiac arrest team from the nurses assigned to the ICU and CCU. When these nurses leave their assigned patients to respond to an arrest elsewhere in the hospital, their patient care responsibilities must be given over to another member of the Community 5 nursing staff.

A second and closely related factor exacerbating the staffing situation in the ICU and CCU concerns relief staff. The hospital relies heavily on relief staff to meet peak demands on Community 5 and rightfully so. However, there appears to be no well thought out contingency plan for providing staff to the ICU and CCU who possess the requisite competencies in critical care nursing.

There was a high degree of congruence between the Committee's views of the most pressing problems on Community 5 and those presented by the nursing staff at the hearing on February 16, 1979. The evidence presented by nursing staff was not challenged by the hospital. Indeed, in the hospital's submission to the hearing, it was stated that:

The number of patients, the complexity of their treatment and their nurse dependency varies sometimes greatly from day to day and tour to tour on this floor. The notes made by the nurses (copies of which are also included with the material presented to you) were reviewed by nursing administration and we believe indicate that the nurses were indeed very busy during this period (October 24 - 31, 1978) but there is no indication that necessary care was not given. We also agree that additional staff was needed.

Obviously, agreement over which problems to grapple with is an important first step in resolving them. However, successful problem resolution also depends on the develop-

ment of an adequate repertoire of responses. In the Committee's opinion, both hospital administration and the nurses of Community 5 have tended to rely too heavily on ad hoc and expedient measures. We recognize that such measures provide a great deal of flexibility and often facilitate responsiveness in emergencies and crises; but they do not determine the direction of response.

Therefore, in the interests of ensuring a greater degree of safety for critically ill patients and a more effective response capability on the part of nursing staff, the Assessment Committee puts forward the following recommendations and strongly urges their immediate implementation.

1. THAT THE BASE STAFF OF REGISTERED NURSES IN THE ICU BE INCREASED ON THE EVENING AND NIGHT SHIFTS.
2. THAT PROVISION BE MADE FOR CONSTANT NURSING ATTENDANCE OF PATIENTS REQUIRING VENTILATORY ASSISTANCE.
3. THAT PROVISION BE MADE FOR CONSTANT SURVEILLANCE OF THE CARDIAC MONITORING CONSOLE IN THE CCU.
4. THAT PROVISION BE MADE FOR THE CONTINUOUS PRESENCE OF A NURSE IN THE DAY CARE SURGERY UNIT WHENEVER ANY POST-ANESTHETIC PATIENTS ARE RECOVERING THERE.
5. THAT WHENEVER RELIEF STAFF ARE NEEDED IN THE ICU OR CCU THAT THESE BE DRAWN FROM AMONG THE QUALIFIED NURSES ASSIGNED TO THE 26 BED UNIT ON COMMUNITY 5 RATHER THAN FROM OTHER SOURCES.
6. THAT ON THE NIGHT SHIFT, A NURSE EXPERIENCED IN CRITICAL CARE BE HIRED AS FLOAT STAFF TO INCREASE THE AVAILABILITY OF QUALIFIED NURSES FOR RELIEF DUTY ON COMMUNITY 5.

5. The report acknowledged that the respondent was planning to undertake certain renovations in relation to Community 5 and Miss Low testified that the work delayed consideration and implementation of certain recommendations. Renovations commenced in June 1979 and construction was not completed until April 1980. During that period of time, the ICU was moved to another location pending completion of the work. When the unit returned, eight nurses were added on two tours, however, the bed structure was different than that prior to the renovations. The respondent had also, in the meantime, hired consultants to assist it in the development of a patient classification system which was central to it developing rational staffing standards. Miss Low emphasized that the Assessment Committee report did not detail precise staffing levels. The classification system would permit the respondent to detail its requirements and was not completed until July 31, 1980. The formal response of the respondent to the report of the Assessment Committee is recorded in a formal document dated February, 1979 and the association's reaction is set out in a letter to Miss Low from Miss O'Connor dated July 4, 1979. By the spring of 1980, the association was not impressed with the respondent's progress in responding to the report. This impatience is revealed in two letters,

one to Miss Low of May 2, 1980 and the other to Mr. H. G. Barnes, Chairman of the respondent's Board of Governors of the same date, threatening release of the report to the Minister of Health and the news media. The letters read:

"Dear Miss Low:

Re: Community 5

It is indeed discouraging to note that staffing on Community 5 is again a matter of concern to the nurses working in this area.

At this time, I do not see much point in reiterating our problems. It is evident that the Hospital intends to ignore the findings of the Nursing Assessment Committee by its failure to implement many of the Committee's recommendations. For these reasons the Association will now provide a copy of this report to the Chairman of the Board of Governors, Mr. H. G. Barnes. This, we believe, will afford the Hospital one last opportunity to deal with the situation before we make it *known to the Minister of health and release the report to the news media.*

Yours truly,

Margaret O'Connor
Senior Executive Officer — Operations"

"Dear Mr. Barnes:

Re: Community 5

We write once again regarding the report of the Nursing Assessment Committee, staffing and work assignments on Community 5.

It is indeed discouraging to find these problems have not been alleviated.

To review the sequence of events, two nurses assigned to night duty on Community 5 on October 25-31, 1978 filed a work assignment complaint which was reviewed by an independent Nursing Assessment Committee in accordance with Article 33 of the collective agreement between the Ontario Nurses' Association and St. Catharines General Hospital (see Appendix B, Nursing Assessment Committee Report). The report was released to the parties on February 16, 1979. The Hospital Administration failed to reply to our questions related to a plan of action with respect to the report. On April 27, 1978 the Association addressed a letter to Mr. E. C. Robinson which was copied to the Board of Governors. Subsequent to that letter, we met with the Hospital to discuss the implementation of the report. The respective positions of the parties are enclosed for your further information. Community 5 has now been renovated and reopened with essentially the same staffing pattern as the one which caused the problems in October, 1978. The unit has in fact, increased in size to 12

beds now located in eleven separate rooms, including both ICU and CCU beds. The staffing pattern on evenings and nights includes a charge nurse, a monitor nurse, and three Registered Nurses.

When compared with the previous staffing pattern, (see page 5 Nursing Assessment Committee Report), one can easily determine that there are still only 4 registered nurses assigned to, not 11, but now 12 beds located in 11 separate rooms. The addition of the monitor nurse appears to be the only recommendation related to safe patient care implemented on a consistent basis.

We would appreciate having an opportunity to discuss this matter and other recommendations with yourself, the members of the Board of Governors, and Hospital administration whom you consider to be appropriate.

At this time, we should also inform you that the Association intends to formally *make this situation known* to the Minister of Health and the *news media*, if our last effort to deal with it is unsuccessful. The Association has been reluctant to take these steps because we believe that the Hospital could be seriously undermined as a community resource. On the other hand, failure to deal with recommendation related to safe patient care is of concern to the public as well.

It is indeed unfortunate that the nurses have so much internal conflict in their attempts to do their job. Most employees when they accept employment, anticipate that the employer will provide adequate physical and human resources. Further need to reiterate their position in the public forum will not lessen that conflict. In view of these circumstances, however, there appears to be no alternative except to let the public decide what they believe is fair.

Yours truly,

Margaret O'Connor
Senior Executive Officer — Operation"

We note that Miss O'Connor's frustration was apparent as early as April 27, 1979 in a letter to Mr. Robinson indicating that the association was providing copies of the report to each member of the Board of Governors and that it would be asking the next interest arbitration board to make such recommendations binding.

6. Miss O'Connor sent another letter dated June 3, 1980 to Miss Low detailing the on-going concern of the association over the respondent's lack of response making mention of an incident involving a "patient on telemetry who suffered the attack of ventricular tachycardia..." We might also point out that the grievor was copied in regard to all of Miss O'Connor's correspondence. The letter reads:

“Dear Miss Low:

As indicated in our telephone conversation the day you called, I have met with nurses from Community 5. By way of general comment it is to be noted that they do not share your view with respect to communications or to improvements which have occurred as a result of the Nursing Assessment Committee Report.

There were still complaints concerning the portering of patients, nursing assignments, the availability of orderlies, ordering of supplies from pharmacy, and the placement of newly hired part-time nurses in ICU on an ad hoc basis. Orientation has not been provided to these nurses, one of whom had not worked in thirteen years. We found out, for example, that a nurse has been assigned as the nurse-in-charge, to give meds, and observe the monitor since the report came down.

With respect to the classification system, the nurses observe that it may be beneficial in assessing the needs of patient census. However, when ICU census is low, staff is not readily available to meet subsequent emergency admissions. On occasion when ICU nurses have been assigned to other areas of the hospital, it has taken approximately two hours to have them returned to the unit. One nurse reported that on her return to the unit, she left a nurse on the floor with team leader duties for twenty-seven patients.

With respect to the matter regarding the patient on telemetry who suffered the attack of ventricular tachycardia, the nurses do not agree on the presence of clinical observation being available on the ward. In any case, cardiac monitoring is supposed to provide the fastest possible intervention. It is difficult for either the Association or the nurses to accept the current state of staffing and other problems in light of the findings of the Nursing Assessment Committee, particularly those related to safety of patient care. The intervening time span should have enabled the Hospital to plan effectively to meet the problems.

It is with regret, that I must inform the Hospital that the Report of the Nursing Committee will be provided to the Minister of Health and the news media in St. Catharines. Miss A. Gribben, Chief Executive Officer will make the necessary arrangements.

We have come to the time when we believe the Hospital has had ample time to deal with the problems. We have used every available internal mechanism, including the Chairman of Board of Governors, to make the Hospital aware of our problems and views on safe patient care.

As always, the representatives of the Association and the writer are available should the Hospital wish to discuss this matter at any time.

Miss Gribben is proceeding to set a date to carry out our responsibility to make the public aware of the problems.”

7. Miss Low testified that she and Miss O'Connor had discussed the situation involving the patient on telemetry (hereinafter referred to as "Mrs. S."). She said it had been alleged that Mrs. S. had died because of insufficient nurses. Miss Low testified she had investigated the incident and found that the patient had received excellent and expedient care and that she did not die because of a lack of staff. Elaborating on the incident, she said she had a meeting with the grievor on May 9, 1980 wherein the grievor "related a story of a patient dying in our hospital because of staffing". The grievor told her that a patient who was on telemetry in another ward may not have died if there had been more staff in the ICU. Miss Low asked the grievor to name the patient and she could not. However, she did say that the patient in question died on the same day as did a patient with gunshot wounds who had been located in the ICU. Miss Low testified that by this latter information she was able to identify the patient subsequently. She said she was upset with the story she was told and could not believe it. The respondent, she stated, had an excellent communication system and there was nothing in the formal reports to indicate an error over the way in which the patient died. She read the log book and supervisor's report of the shift in question and no unusual concern was expressed by anyone at the time. Miss Low also reviewed the patient's chart and the relevant nursing notes. She also interviewed a Mrs. Lewis, the nurse in charge of patient care at the time.

8. She testified that her investigation revealed the following: Mrs. Lewis and Mrs. Morrison, a registered nursing assistant, made rounds on C3 west at the beginning of the shift. Mrs. Morrison helped the patient in question back into bed after she had gone to the bathroom. Mrs. Morrison left the room but the patient rang and Mrs. Morrison answered immediately. Mrs. Morrison discovered the patient in distress. Mrs. Morrison concluded she needed immediate care by a nurse. As she stepped into the hallway, she met the evening nurse, Mrs. Rolf, who had returned to the floor having forgotten something. Mr. Rolf recognized the seriousness of the situation and immediately commenced cardiac pulmonary resuscitation of the patient. Mrs. Morrison, in turn, advised Mrs. Lewis and Mrs. Lewis telephoned the switchboard to report that there was a cardiac arrest. Mrs. Lewis was advised by the switchboard that an arrest team was already on its way because a call had come in from the ICU on C5. There was monitor on C5 monitoring this particular patient on C3. Mrs. Butler, a supervisor, and Mrs. Lennard, another nurse, had gone up to C5 just before this situation arose because another patient in the ICU suffering from gunshot wounds was deteriorating. At some point after they had arrived, a Miss Berges, who was watching the monitors, exclaimed "VT!" A Mrs. McArthur who was now free because of the death of the gunshot wound patient and Mrs. Lennard proceeded to C3 with the arrest cart and Mrs. Butler called the switchboard to advise of the situation. Miss Low testified that as a result of her investigation she was not aware of the monitor being unattended at anytime during the incident and that, based on her review of the situation, the patient received immediate and excellent care. Indeed, in her view, the care could not have been improved upon.

9. Low testified that she advised the grievor of this latter fact by way of a casual remark when they met sometime later in a hallway but she did not provide the grievor with any details of the investigation. In cross-examination, she admitted that when the grievor raised the matter with her on May 9, 1980, the grievor was making reference to notes in her possession at the time and Miss Low was quite aware that the grievor was relaying the concerns and information she had received from other nurses. Against this background, a casual remark in a hallway seems like an inadequate response to so serious a charge. However, Miss Low testified that she told Miss O'Connor "the same thing" at a meeting held on June 16, 1980. This meeting was attended by Anne Gribben, Chief Executive Officer of the complainant; Miss O'Connor,

the grievor; Mrs. Katz; Mr. E. C. Robinson, Executive Director of the respondent; Miss Low and Miss Low's assistant, Mr. Forrester. Miss Low testified that they discussed items relating to the Assessment Committee's report and Miss Gribben referred to the patient on C3 west who had died. Miss Low testified that in speaking to Mr. Robinson, Miss Gribben stated a patient had died in the hospital because there were not enough staff in the ICU. Miss Low told the meeting she had investigated the circumstances of the patient's death and the patient had received excellent care. Without using the actual name of the patient, she asked the grievor if it was the same person about whom she had spoken earlier and the grievor acknowledged that it was. Miss Low said this was the last mention of the incident and she assumed that she had "set the matter right" until she overheard the media reporting of the association's press conference held on June 18, 1980.

10. The association remained unsatisfied with the respondent's response to the Assessment Committee's report following the meeting of June 16, 1980 and carried out its threat of publicity contained in Miss O'Connor's letter of June 3, 1980. By letter dated June 18, 1980, Miss Gribben wrote to the Minister of Health in the following terms:

"Dear Mr. Timbrell: *Re: St. Catharines General Hospital*

Your Ministry has been informed of the problem of safe patient care at the above-mentioned hospital from time to time. We are now bringing this matter to your personal attention.

In February 1979 an independent Nursing Assessment Committee, composed of three highly-respected members of the nursing profession, released a report dealing with patient care and other related matters in ICU, CCU, Day Care Surgery and a 26-bed medical surgical ward at St. Catharines General Hospital (report enclosed). This Committee met, in accordance with a provision contained in the Collective Agreement between the Ontario Nurses' Association and St. Catharines General, following a written complaint submitted by two nurses assigned to night duty. You will note, the Nursing Assessment Committee made a number of recommendations, in particular, to the area of "Safety of Patient care". Problems in this have not yet been alleviated.

The Association has corresponded with the Hospital Administration and the Board of Governors, and has met with the Hospital Administration on a number of occasions to deal with the implementation of this report — particularly those recommendations related to "Safety of Patient Care" (see enclosures). The Hospital Administration takes the position that it must give further study to the Committee's findings in spite of the fact that the report was released to both parties some 16 months ago. It is our understanding that at this late date the Hospital Administrator is now approaching your Ministry requesting a review of staffing patterns in this area.

In view of the existing report, the Association insists that this step is redundant. The contents of the report are of public concern and address themselves to the quality and safety of care in a public hospital in Ontario.

As previously stated in correspondence to the Hospital's Board of Governors, the Association has been reluctant to release this report to the public because we believe that the Hospital's services could be seriously undermined as a community resource. On the other hand, it is the responsibility of a Hospital Administration to ensure the delivery of a safe standard of care to the public. Failure to deal with recommendations related to safe patient care is an abdication of that responsibility! This should be of major concern to the public.

In spite of our attempts to resolve these issues, conditions remain unsafe. As professional nurses we have no alternative but to inform the public. No doubt public reaction will serve as a guideline to your Ministry."

A press conference was also held and Miss Low recorded a number of media reports of this press conference. The following two reports are representative and the first report constitutes the primary basis for the respondent's filing of the complaint with the College.

#1

C.H.S.C. 10:00 p.m. Wednesday, June 18th, 1980

REPORTER:were understaffed based on two things. One is a report commissioned by the O.N.A. under the provision of the agreement between O.N.A. Local 26 and the General Hospital. The independent Nursing Assessment Committee says the General's ICU is severely understaffed and nurses working there agree. In fact, Kathy Mancini, the President of Local 26 of the Nurses Association says, there was a tragic situation recently where a patient actually died because the nurse monitoring ICU patients had to leave their post.

MANCINI: The nurse, because of a very critically ill patient which we had on the unit at the time had to go the another nurse's assistance, left the monitor as she was in charge as well and weighing the pros and cons of the situation and making a nursing judgment, went to the aid of the nurse with this patient for a matter of three minutes maximum, when she came back, a patient on another floor who was being monitored at the time, needed emergency assistance. The patient expired unbeknown to us whether how long it was going on or whatever.

REPORTER: the patient died?

MANCINI: Yes.

REPORTER: Mancini says she can't blame the death directly on the shortage of nurses in the intensive care unit but she can't rule it out either.

#2

C.H.S.C. 8:00 p.m. Wednesday, June 18th, 1980

REPORTER: ...Ontario Nurses Association. C.H.S.C.'s Tim Fletcher has more:

The Ontario Nurses Association said the intensive care unit at The St. Catharines General is critically short of nurses. O.N.A. Local 26 President Cathy Mancini told me one incident where only 3 nurses were on duty. The one nurse watching the patient monitor panel had to leave to help the other nurses when a critically ill patient came in. When she came back a few minutes later, the panel showed a patient was in deep trouble. Although corrective action was taken, the patient died. The O.N.A. wouldn't blame the death though directly to the shortage of nurses. What is more likely they charge is that when only 3 nurses are on duty, that is nights and weekends, patient care can suffer to a great degree with only 1 nurse per 4 patients when the ICU is full. Ironically evenings and weekends when there are the least number of nurses on, that's when often the intensive care unit is the busiest, full up with the 12 patients it can handle at a time. The nurses say an independent nursing review committee, 16 months ago, says there should be more staff on the ICU at all times, not just during the day time on weekdays. The Hospital will only say its studying the report. Sometimes when they know the ICU will be busy because of operations schedule in advance they will bring in more nurses on a temporary basis, but only temporary. And here's another irony for the last 2 months the equivalent of 3 full time nursing positions have been temporarily assigned to the night or weekend shift, has not caused any problems elsewhere in the Hospital. Why, the nurses ask, can't they be there all the time. The Hospital in a reply to the nurses report, said it believes safe practices are being followed. The nurses say the public's lives are in jeopardy at the St. Catharines General Hospital if the intensive care unit gets active when only 3 nurses are on duty, and since the Hospital refuses to act, the nurses have to bring their case directly to the public.

The press conference and a review of the respondent's response to the issues raised at it were reviewed by the St. Catharines Standard of June 19, 1980 under the heading "Patient At General In Danger, Nurses Claim — Hospital Director Denies Union Charge." The newspaper report reads:

PATIENTS AT GENERAL IN DANGER, NURSES CLAIM

By ED McKENZIE
Standard Reporter

Is the St. Catharines General Hospital putting patients' lives in danger by understaffing its critical care unit?

Or is the labor union which makes this claim — the Ontario Nurses' Association (ONA) — trying to use the General to win more clout province-wide?

Those were the key questions yesterday as the ONA brought its top officials to St. Catharines to warn the community that "the public's lives are in jeopardy."

ANNE GRIBBEN, ONA chief executive officer, accused the hospital of showing "a lack of regard for the safety of patient care" and of placing "the health and safety of the public in imminent danger."

But Carey Robinson, executive director of the General, denied the claim, saying that in this case, as in all others, the hospital's "first concern is good patient care."

Miss Gribben announced the ONA has asked Health Minister Dennis Timbrell to take immediate action to correct what she termed "the abdication of the hospital's responsibility to provide safe care to the public."

But a spokesman for Mr. Timbrell said in the minister's view, "this appears to be in large measure a labor-management concern." The minister feels "quality of care of patients at the St. Catharines General rest with the board of directors," and Mr. Timbrell expressed "confidence in their ability."

However, the minister will look into the situation if it should turn out that an examination is warranted, and Mr. Robinson said he has already invited the health ministry to do a special assessment of the hospital's critical care area, to verify that staffing is, indeed, adequate in this key section of the General.

BOTH SIDES in the dispute referred to the report made by a nursing assessment committee which was completed in 1979. That committee was set up under the collective agreement between the hospital and ONA.

Under the section dealing with the safety of patient care in the coronary care and intensive care units, six recommendations were made. The first one is that the base staff of registered nurses be increased on the evening and night shifts, and it was in this area the Miss Gribben concentrated her remarks.

She said there are only three nurses for 12 beds. Asked how many ONA feels there should be, she said that ideally, there would be 12 — one for each patient.

Miss Gribben said between April 1 and May 31, there were 116 extra tours of duty in the area. This means extra nurses were called in to back up the regularly-scheduled staff. She said this indicated there should be at least three extra staff nurses.

BUT MR. ROBINSON maintained staffing is at an acceptable level, noting the critical care area and the progressive (intermediate) care area are adjacent now that renovations have been completed on the Community Wing's fifth floor.

He said if extra nurses are needed for critical care, they can be brought in from progressive care. In addition, supervisors can assess caseload, and when demand warrants, extra nurses can be called in from a special duty roster.

Miss Gribben said ONA takes the position it's dangerous to operate this way. The critical care area

should be fully-staffed to take care of a full load. If some of those nurses aren't needed, they can be sent to other duties.

Mr. Robinson called this "putting the wrong end-to".

He noted the report of the nursing assessment committee is not binding on the hospital (although he claimed the General has implemented virtually all of the recommendations made in the 44-page document presented a year ago last February).

HE SAID ONA HAS tried and failed to make such committee recommendations binding across the province, citing several arbitration cases in which the issue has been decided against ONA.

"They're trying to get from us something they could not get from an arbitration board," Mr. Robinson stated, pointing to what he called the "wide implications" of the case here.

But Miss Gribben denied that the charges ONA is making could be viewed as part of a union-management squabble.

She insisted the nurses who belong to the union feel they have an obligation to "fight for patient care", and she claimed the General has been "lucky" so far in that the lack of staff has not resulted in a case of death or serious injury to a patient.

Miss Gribben cited one case recently in which a patient's heart monitor was being constantly watched by a nurse (this was one of the six committee recommendations). But because no one else was available, that nurse had to go to other duties in the intensive care area.

WHEN SHE GOT BACK in "five or 10 minutes," the patient's heart pattern had changed. Emergency steps were taken, but the patient died.

The ONA spokeswoman said it could not be said, in this case, that the woman would have lived if the nurse had been watching the monitor all the time. But she maintained that in another case, it might very well make a difference.

Noting that the General recently used its own funds to renovate the critical care area, after the health ministry said it could not supply money for the project, Miss Gribben agreed "all the equipment's there," but "they've neglected to put (sufficient) staff in there."

11. Miss Low's testimony emphasized statement #1 containing statements attributed to the grievor. She said Miss Berges, did not tell her what the grievor alleged at the press conference and therefore the grievor's statement that the monitor was unattended was untrue. She said Miss Berges did leave the monitor to make rounds but she was replaced by a Heather Rogers. Rogers then went on her regular assignment when Miss Berges returned. There was nothing unusual about the patient's pattern who was on telemetry while Rogers was at the monitor and the pattern was normal on Berges' return. Only after Berges returned did the patient's pattern become abnormal. Mrs. Booth, the 3 — 11 monitor nurse had told Miss Berges to keep her eye on this particular patient's pattern because of earlier abnormal rhythms. The patient was seventy-one years old with a long standing history of heart disease. Berges was

therefore sensitive to potential problems. Low stated that Berges or someone else was at the monitor at all relevant times and the patient did not expire "unbeknown" to anyone as alleged by the grievor. Miss Low said Mrs. Lennard was most upset after having read the newspaper report and heard the newscasts and that Mrs. Lennard had told her the patient received exceptional care. Miss Low approached the grievor on June 19, 1980 and testified that she still did not even know the patient's name.

12. Low testified that because the patient in question had been in the hospital less than twenty-four hours prior to her death, the respondent advised the coroner. A coroner's inquiry was subsequently conducted by Dr. Peter O'Halloran and he was satisfied with the conditions surrounding the patient's death. Some further inquiries were made by the Regional Coroner after the news media coverage but no inquest was ordered. Miss Low testified that she filed a complaint with the College after a great deal of deliberation by the Administrative Committee of the respondent and after discussion with the chairman. She stated that they were very disturbed by the adverse publicity given to the respondent — an institution which has had an excellent reputation for well over one hundred years. They were, she said, concerned because the information given by the grievor was not true — a patient in the hospital did not die because of a lack of staff in the ICU unit. They felt they could not let the matter pass and consulted the respondent's local solicitor. They saw at least three possible courses of action: (1) dismissing the grievor; (2) commencing a lawsuit against her for defamation and slander; and (3) reporting her to the College for professional misconduct. The course chosen was to report her to the College. Miss Low saw this approach less detrimental for the grievor whom she said was a "fine person" and "a good nurse". However, because the incident was damaging to the respondent "in the eyes of the citizens of St. Catharines" they could not let it pass, she stated. Miss Low felt she had a professional obligation to report the matter to the College because the statements of the grievor were false and detrimental to both the respondent and the community. Miss Low said the respondent would have done nothing had the grievor "stuck to the facts". The respondent had no objection to the report being made public or to any accurate comment upon it. Miss Low stated that on or about July 9, 1980, she called the grievor into her office and advised her that she had been reported to the College because she had given false information to the press on June 18. Miss Low said it was her practice to speak to people "face to face" in such circumstances and she felt she had a good relationship with the grievor. The grievor became very upset saying 'it can't be true'; 'it can't be happening to me'; 'it's my profession'. She began to cry and left the office. Miss Low pursued her to comfort her and found her in the locker room. There the grievor said she wished she had not taken the job of local president and that she would resign. She said she had done all this "for the girls on C5". She said she "had acted on what they told (her)". She had accepted what they said at "face value". She said "(she) believed them and this is what (she gets)". She was concerned about the impact of the incident on her pregnancy and Miss Low spoke to her doctor who prescribed a tranquillizer. Miss Low then drove her home. Miss Low said that after the press conference she received "a lot of feedback from staff, people in the community, officials of the city". Everyone, she said, was questioning what was right or wrong with the respondent hospital and what kind of care it was giving. She said "a lot of harm" ensued from the publicity given.

13. Apparently as a result of the complainant's letter to the Minister of health, Mr. Robinson wrote to Dr. D. A. Dyer, Assistant Deputy Minister of Health by letter dated June 17, 1980 and officials of the respondent met with Ministry officials late in June. By letter dated July 7, 1980, the Ministry indicated its satisfaction with the respondent's ongoing response to the recommendations of the Assessment Committee's report. The Ministry therefore decided

against sending a team of consultants as requested by the respondent. This letter, a related letter to Miss Gribben and the respondent's earlier letter of June 17, 1980, read:

"Dear Dr. Dyer:

As you are probably aware, there are several contracts between Ontario Nurses Association locals and hospitals in the Province of Ontario which contain a "Professional Responsibility" Clause. Ours is one of those hospitals. Very briefly, the professional responsibility clause provides for members of the bargaining unit to lodge complaints with management that they feel come in the area of professional responsibility and if a satisfactory solution between members of the bargaining unit and hospital's management cannot be achieved, then the contract provides for the appointment of a Nursing Assessment Committee composed of three nurses, one being the Chairman who is selected from a list of names previously agreed between the union and management, a nominee of the union and a nominee of the Hospital. Such a Committee is much like an arbitration board except that the findings of the Committee are not binding on the parties.

In October 1978, a number of our nurses working on what we refer to as Community 5, a floor which contained our 11 bed ICU-CCU facilities as well as 26 general medical-surgical beds and an 8 bed day surgery unit, filed such a complaint, claiming understaffing, particularly in the ICU-CCU areas. This matter could not be resolved between the parties and as a result, a Nursing Assessment Committee was appointed to investigate this complaint. The Committee met in February 1979 and the report was received about a month later, in mid March 1979. As a result of discussions and meetings between the parties, including representatives from the O.N.A. Central Office on at least one occasion, most of the points were resolved by mid June 1979. Since we were then approaching the time when a major renovation programme on that floor was to start, we agreed to review a couple of the items which had not been resolved when the renovations were completed and the unit reoccupied.

Community 5 was closed at the end of June 1979 for the renovation programme and following completion of the project in early April of this year the new 12 bed ICU-CCU section, now known only as an ICU, was occupied on April 15 and we commenced to re-occupy the progressive or intermediate care section of the floor on May 5.

Under date of May 2, the Senior Executive Officer-Operations of O.N.A. wrote to our Director of Nursing and to the Chairman of the Board of Governors reiterating their concern about staffing and work assignments on that floor and also the concerns to the nurses working in the area. The letter stated that "It is evident that the Hospital intends to ignore the findings of the Nursing Assessment Committee by its failure to implement many of the Committee's recommendations" and "At this time, we should also inform you that the Association intends to formally

make this situation known to the Minister of Health and the news media, if our last effort to deal with it is unsuccessful". We acknowledged this letter from O.N.A. advising that the Director of Nursing and I had discussed the views expressed and that a further review was to be made and we would then be in a position to respond more formally to these letters. This acknowledgment was sent under date of May 8, 1980. Subsequently, there was a discussion between the Senior Executive Officer-Operations of O.N.A. and myself on the telephone on May 16 and also between our Director of Nursing and the same officer on May 26, the latter conversation suggesting that the Senior Executive Officer-Operations of O.N.A. visit this Hospital and that a meeting be arranged between the parties concerned in order that these matters could be discussed. We were therefore considerably surprised to receive under date of June 3, 1980, a further letter from O.N.A. regarding these matters. In that letter, it was stated in part as follows:

- It is with regret, that I must inform the Hospital that the Report of the Nursing Committee will be provided to the Minister of Health and the news media in St. Catharines. Miss A. Gribben, Chief Executive Officer will make the necessary arrangements.
- As always, the representatives of the Association and the writer are available should the Hospital wish to discuss this matter at any time.

While a meeting was offered in the above referred to letter, it was with great difficulty, in telephone communications with the Chief Executive Officer of O.N.A. on June 6 and 9, that I was able to get her to agree to a meeting which was held at this Hospital at 1000 hours on June 16. At that meeting, we attempted to explain to the O.N.A. representatives that we were having our Nursing Staff Co-ordinator study the area and that, on completion of those studies, we would then have to reach conclusion regarding any indicated adjustment of staffing patterns. This was not acceptable to the O.N.A. representatives who felt that we had had 15 months, since March 1979, to do the necessary planning whereas we contended that only having re-occupied the unit in part in Mid April and fully on May 5, proper assessment could only be done under working conditions. After some $3\frac{1}{3}$ hours of discussion, O.N.A. representatives stated that if the Hospital didn't act now, it would proceed to provide the Minister of health with a copy of the Nursing Assessment Committee report and ask him to investigate the staffing of this area and also provide information to the news media in St. Catharines: as it was stated in O.N.A.'s letter of May 2, "to let the public decide what they believe is fair".

Very briefly stated, the most contentious issue, though not the only one, between O.N.A. and the Hospital is the recommendation of the Nursing Assessment under the heading of "Safety of Patient Care" which states as follows:

That the base staff of registered nurses in the ICU be increased on the evening and night shifts.

No suggestions of what such increases should be were made in the report.

At the time the Assessment Committee studied the area, prior to the renovations, it consisted of 37 beds including 11 ICU-CCU beds, with a staff of 44.6. After renovating, the same area now consists of 24 beds including 12 ICU-CCU beds, whereas the staff has been increased to 53.6. We feel that 13 less beds and 9 more staff members comprised of 1 ward secretary and 8 nurses, certainly shows a willingness to adjust. The Hospital has further proposed that is is seriously considering replacing 4 R.N.A.'s on the unit with 3 R.N.'s. This is base staff and is, of course, supplemented by adding the best part-time nurses available who are experienced in ICU-CCU nursing care based on patient requirements. O.N.A. contends that base staff should be planned on the basis of the maximum conditions which could be encountered, with surplus staff transferred to other areas when not needed.

Naturally, we are interested in providing the best possible care to our patients. In an attempt to measure this, our Director of Nursing made a survey of 12 other hospitals of similar size to ours with regard to ICU-CCU staffing and had come to the conclusion that the staffing now provided in our ICU is at least the equal of any or higher than all of the hospitals surveyed. Granted, this was a gross survey only and does not take into account the detailed analysis of the type of patients cared for but we feel that it is sufficient to maintain that, until our studies are completed, staffing is adequate.

It would be an easy solution to this matter to give in to the demands of the Ontario Nurses Association. However, we believe that we were the first hospital in the Province of Ontario to be taken to a Nursing Assessment Committee on the basis of a staffing and work assignment complaint and since the recommendations of the Nursing Assessment Committee are not obligatory to implement on the part of the Hospital, if we do accede to the Association's interpretations of these recommendations, it will set a far reaching precedent in the Province of Ontario, with very serious implications to the future financing of units such as our intensive and progressive care area. The inclusion of a "Professional Responsibility" clause is a central issue demand by O.N.A. in bargaining for new contracts, which bargaining will commence shortly for all hospitals in the Province of Ontario with which it has an agreement. In the last set of negotiations they not only wanted such a clause included in all contracts but they also demanded that the recommendations of the Assessment Committee be binding. This demand was denied whenever they took it to arbitration. Since they lost it through one process they are now attempting to gain it through establishing a precedent. We, therefore, feel that the implications of this are very significant. We are firmly convinced that O.N.A. is using this Hospital as a "test case".

We are therefore requesting you to appoint a high quality assessment and evaluation team of Ministry consultants to review the staffing patt-

erns and work assignments on our newly renovated Community 5 floor, particularly the ICU, to assist us in resolving the differences which we have with the Ontario Nurses Association. We feel that this request is not only in the best interests of this Hospital but those of all hospitals having contracts with O.N.A. and ultimately, because of the financial implications, not only the Ministry of Health but the taxpayers of this Province.

We urge your serious consideration and early as possible response to this request."

"July 7, 1980

Dear Mr. Robinson:

This is in reply to your June 17, 1980 letter, in which you describe the difficulties your hospital and the Ontario Nurses' Association are encountering in reaching a mutually agreeable course of action, following the Nursing Assessment Committee's Survey and recommendations for staffing The St. Catharines General Hospital's Intensive Care Unit.

I wish to express my thanks and appreciation to you and the members of your senior staff who came to Toronto on June 26, to meet with the Executive Director of the Institutional Division, the Director of the Institutional Operations Branch and Ministry consulting staff, who relate to The St. Catharines General. It was most helpful to discuss the entire situation with you.

It is evident that with the exception of an unresolved issue concerning staffing, you have implemented the majority of the recommendations of the Assessment Committee Report.

The fact that you are presently introducing patient classification in the Intensive Care Unit is commended. This tool will greatly assist in identifying patients' needs for nursing staff and altering staff in relation to changes in workload.

In view of the foregoing, the Minister of Health has concluded that it is not necessary to send a team of consultants into the hospital. The ultimate responsibility for patient care rests with the Board of Governors of The St. Catharines General Hospital, in whom the Minister has complete confidence.

Yours sincerely,

Allan E. Dyer, PH.D., M.D.
Assistant Deputy Minister
Institutional Health Services"

July 7, 1980

Dear Miss Gribben:

*Re: The St. Catharines General
Hospital*

This is in reply to you June 18, 1980 and June 23, 1980 letters to the Minister of health, The Honourable Dennis R. Timbrell. This letter also responds to Miss Margaret O'Connor's June 26 letter to me. The Minister has requested me to reply on his behalf.

I note that your association is encountering difficulties with The St. Catharines General Hospital in reaching a mutually agreeable course of action, following the Nursing Assessment Committee's Survey and recommendations for staffing The St. Catharines General Hospital's Intensive Care Unit.

The hospital is presently introducing a patient classification system in the Intensive Care Unit. This will greatly assist in identifying patient needs for nursing staff and altering staff in relation to changes in workload.

In view of the foregoing, the Minister of Health has concluded that it is not necessary to sent a team of consultants into the hospital. Ultimate responsibility for patient care rests with the Board of Governors of The St. Catharines General hospital, in whom the Minister has complete confidence.

Yours sincerely,

Allan E. Dyer, PH.D., M.D.
Assistant Deputy Minister
Institutional Health Services"

To this extent then, the publicity generated by both the complainant's and grievor's comments does not appear to have undermined the confidence of the governmental authority ultimately responsible for the quality of care provided by the respondent.

14. On cross-examination, Miss Low was asked why a Miss Margaret Swarbrick, R.N., and an employee of the respondent was not reported to the College for writing the following letter to the St. Catharines Standard which was reported by newspaper on July 2, 1980.

Defends nurses' stand

I wish to respond to your recent article concerning the Ontario Nurses' Association and the St. Catharines General Hospital.

I work in the intensive care unit and feel entitled to defend ONA's stand.

The unit on frequent occasions on the evening and night shift is staffed in a fashion that leaves much to be desired.

I think the admission by the administrator that 116 extra nurses had been booked for various tours of duty since the renovated unit

opened on April 15 speaks for itself — that more staff is necessary. One radio report stated that the staff had been increased to 54; that may be so but it certainly was not 54 registered nurses. ONA does not expect Utopia but the ad hoc basis of supplementing staff is not the most propitious for a safe working environment.

These and many other problems have been discussed at numerous nursing-management meetings without being resolved satisfactorily; indeed that last such meeting on June 16 wasn't even attended by any of these "concerned" board members. I personally dislike this washing of dirty linen in public but the hospital left ONA with little choice.

It's you, the public, for whom these services are available. Don't you think you are entitled to the best?

Margaret Swarbrick, R.N.
230 St Augustine Dr.

Miss Low replied that the letter was not sensational and that the statement was true as far as it went. When asked why she did not report Anne Gribben to the College as well, Miss Low replied that in hindsight she probably should have but probably did not because Gribben was not employed by the respondent. She said, in retrospect, she may have been in error in failing to do so. She also agreed that Miss Berges was the charge nurse and on the monitor at the same time. One of the nurses scheduled for the shift in question called in ill at 8:20 p.m. and a replacement was not available. Berges therefore reassigned staff and performed the dual function of charge nurse and monitor nurse. She testified that the complaint to the College was with the approval of the respondent's Board of Governors and constituted a decision of the Administration Committee. The wording of the complaint was reviewed by the respondent's solicitor before being sent to the College. She said she "steered" the Committee in the direction of the College in considering the options against the grievor. It was felt that the laying of a complaint was the "kinder" thing to do. Miss Low said she did not contact Berges, Irene McArthur or Margery Rose (the three senior nurses on the ICU that night) prior to filing the complaint. She said she was satisfied with the report she received from the supervisors so she did not speak with these nurses. She acknowledges that, in reporting the incident to her on May 9, the grievor was genuinely concerned and that she was relying on information received from nurses on the ward. She also agreed that she never advised the complainant or grievor of the details of the investigation conducted.

15. On re-examination, Miss Low agreed that she did not like the idea of the complainant going to the press because the respondent was not being given a chance to do what it thought was right. Interim staffing adjustments had been made; there had just been a return to the renovated C5; the development of a patient classification was under way; and there was a need for the nurses to become oriented to the new physical arrangements. But while she did not like the idea, she said she did not fear the outcome in that any public description of the true situation would not have been upsetting particularly if the respondent's reactions to the Assessment Committee's report were accurately reported. The complaint to the College was filed because "the information given to the press was not accurate. A nurse should not be able to make a statement that is not true", she testified. Miss Low also stated that the patient who had died was the grandmother of a person living next door to her. She therefore took a personal interest in the circumstances surrounding her death. She spoke to the head nurse; reviewed the charts; spoke to Mrs. Lewis who was the night nurse; and Mrs. Lennard, the night supervisor who was involved in the cardiac arrest procedure. She spoke to Mrs. Sheild, the head nurse, the very next day after the death. She said she was assured by reading Mrs. Lewis' notes and in talking to her that the patient received immediate care. After May 9, 1980, she

asked Mrs. Lewis to review again all her actions until the patient expired. From all of this information, she concluded the patient received immediate attention and everything that could have been done was done to save her. She said to her knowledge the monitor was not left unattended. In making this assertion, she relied on a written statement of Berges and conversations with Rogers, Butler and Lennard. After the press conference she asked Mrs. Lennard to write out her version of the incident. On the basis of all her investigations she understood that at the time of the cardiac arrest, Miss Berges was at the monitor although she may have been looking for a death notice in relation to the gunshot wound patient. She also thought that the most severe action the College would take was a letter of reprimand.

16. The Board was advised that by decision dated February 11, 1981, the complaint was dismissed by the College on the basis that it was alleged Mrs. Mancini made untrue statements to the press and "statements of nurses present in ICU at the time substantiate that the statements made to the press by Mrs. Mancini were technically true". An appeal to the Health Disciplines Board was also dismissed on the basis that the subject matter of the complaint was not conducted in the course of nursing and within the jurisdiction of the College. The latter decision dated August 1981 is a brief one which can be set out in full.

Miss Low requested a review by the health Discipline Board. The review was attended by Miss Low with counsel, Mr. David Wakely; Mrs. Mancini with counsel, Mr. Chris Paliare. The College was represented by Mrs. Jean Dalziel, Assistant Director, Complaints and Discipline, Mrs. Aleta O'Dea, Investigations Officer, and Mr. Michael Thurston, counsel to the College.

Mr. Wakely told the Board that statements made at a press conference by Mrs. Mancini, in her capacity as President of Local 26 of the Ontario Nurses Association (O.N.A.), were false and intended to damage the reputation of the St. Catharines General Hospital in the eyes of the public. Mr. Wakely explained that the press conference had been called to discuss the implementation of recommendations made to the Hospital by the O.N.A.

In her statement to the press on June 18, 1980, Mrs. Mancini said that a nurse, because of a critically ill patient, had to go to another nurse's assistance and left the monitor for a matter of three minutes maximum. When she came back, a patient on another floor who was being monitored at the time needed assistance. That patient expired.

Mr. Wakely said the nurse in charge of the Hospital's Intensive Care Unit had left her station at the monitor to assist with a critically ill patient but had assigned another nurse to attend the monitor in her absence. He said the charge-nurse was away for a matter of about three minutes and had been back at the monitor station for some ten minutes before the monitor indicated a female patient on another floor was in some difficulty. He stated the monitor was never left unattended and that immediate emergency care was provided the female patient. Mrs. Mancini was not present in the Intensive Care Unit at the time. She received her information from the nurses on duty in the unit.

Mr. Wakely told the Board Miss Low had advised Mrs. Mancini on two occasions prior to the press conference that her information regarding the incident was incorrect. Both Mr. Wakely and Miss Low made it clear to the Board that Mrs. Mancini's competence as a nurse was not in question. However, her action was considered to be professional misconduct as defined in Section 26(m) of The Ontario Regulation 577/75 made under The Health Disciplines Act.

Mr. Paliare told the Board that in his view, the matter is a labour relations issue and not one which should be properly referred to or considered by the Complaints Committee of the College.

Mr. Paliare referred to statements, gathered by the College of Nurses during its investigation, from the nurses on duty in the Intensive Care Unit. He said it was clear that the nurses had not been able to give their full attention to the monitors because of the many duties they were carrying out at the time, and because of the limited number of staff on duty. At that time, there were ten patients on the monitors.

Mrs. Dalziel summarized the College's investigation.

The Board, having heard the submissions of the parties and reviewed the documents before it, is of the view that the College conducted a proper investigation.

Ontario Regulation 577/75, Section 21(m) refers to conduct or an act relevant to the performance of nursing services and clearly applies to the actual practice of nursing. The Board is of the view that in making the statement complained of, Mrs. Mancini could not be deemed to be performing an act relative to the performance of nursing services and, therefore, does not contravene the Act or the Regulations.

The Board confirms the decision.

DATED AT TORONTO, THIS 31st DAY OF August, A.D. 1981.

Ronald Watson
Vice-Chairman

17. Miss Margaret O'Connor, Senior Executive Officer of Operations for the complainant, testified. She described for the Board the background to the complaint by nurses leading up to the establishment of the Assessment Committee and its report of February 1979. She further testified with respect to on-going discussions with the respondent hospital over the implementation of the Committee's report. She said the respondent was prepared to implement certain sections of the report but that parties reached an impasse over the complainant's demand for an increase in the base staff. The respondent, she stated, wished to increase staff on an *ad hoc* basis by the use of part-time nurses who may or may not be available and familiar with the ICU. She agreed that matters had been complicated by the move to Mills 4 pending renovation of C5. She also objected to the use of supervisors in the ICU because they were

involved in administrative matters that can distract them from patient care. She felt that after the move back to C5, the staff remained essentially the same with sometimes someone on the monitor and sometimes no one on the monitor. She felt this problem was continuing to date. She testified that it was the decision of the complainant that if the Assessment Committee's report was going to be disregarded in the area of its recommendations dealing with safe patient care, the public should become aware of the situation. She said that at the conclusion of the meeting with the respondent on June 16, it was apparent that the respondent would not agree to implement the Assessment Committee's report in total. She said that the respondent wished to implement its patient classification system and wanted further time to evaluate the need for an increase in staff. On cross-examination, she said that she undertood the recommendation of the Assessment Committee for constant surveillance of the monitors to mean the use of a nurse whose job was confined to watching the monitor. She took the view that the nurse in question should be assigned no other duties but she was not prepared to say how many other hospitals employed one person to look at the monitors to the exclusion of everything else. She agreed that inaccurate information with respect to the respondent's responsibility for the death of a patient could have irreparable harm on its reputation in the community.

18. Laura MacPherson, currently the president of Local 26, testified that she attended the meeting with Miss Low shortly after she had received Miss O'Connor's letter of May 2 threatening to make the report public. She testified that Miss Low stated at the meeting that the approach was a form of 'black mail' and that "[she] had friends in high places and that [she would] go as far as [she] had to". Miss MacPherson testified that Miss Low seemed angry and "rattled". She further testified that she was at a meeting of nurses convened by the grievor to discuss the incident. Cathy Berges, Jan Dusek, Gladys Katz, and Irene McArthur were at the meeting along with "a couple of others from ICU". She said notes were taken at the meeting and although some nurses came with notes already written up, all of the documentation was reviewed at the meeting and additional notes were taken. She said she recalled Miss Berges saying that she was not present at the monitor and that she had other duties to perform. Miss MacPherson recalled Miss Berges saying that when she returned to the monitor, she noticed the patient had gone into VT. She seemed to recall that Miss Berges was involved with a patient who had expired from gunshot wounds and that she was busy preparing a death certificate at the time. Miss Berges was the charge nurse and monitor nurse that evening. She testified that there was concern over allowing this to occur; that nurses were concerned about safe patient care; and that it was time something was done about it. Thereafter Anne Gribben was informed of the situation. On cross-examination, she admitted that she did not recall that Cathy Berges said she had to go to another room at the time. Rather she believed that Miss Berges was away from the monitor doing other duties. The nurses at the meeting were not told where Mrs. Lennard and Miss Rogers were at the time and there was no discussion about who actually attending the patient on the third floor. Miss MacPherson did not know how soon after the patient's call light went on that she was attended to. The nurses who were attending to the patient on the third floor were not present at the meeting in question. However, Miss MacPherson emphasized that she recalled Miss Berges saying that she came back to the monitor and saw the VT and she vaguely recollected that three minutes was the period of time mentioned that she had been away from the monitor. It was her recollection that Miss Rose wrote out a document describing the events of that evening; that Mrs. Mancini questioned the nurses present to get a better understanding of the sequence of events; and that Mrs. Mancini made certain additions to the notes she was given. She said that Cathy Berges tried to explain to the group and to the grievor what she had been doing at the time because the notes did not explain this clearly. She said that Cathy Berges may have said she went to another room or that

she was at the desk preparing a death certificate, but in either event, she was not right at the monitor. She said the idea of the meeting was to gather all of this information and to present it to Miss Low. The staff, she said, was clearly dissatisfied with the way things were running.

19. Mrs. Marjory Anne Rose testified that she was working on the night shift in the ICU unit at the time in question. She testified that there was a full-time monitor nurse on duty for the 3 — 11:00 shift. When she came on duty, it was learned that there was not sufficient staff to maintain the monitor nurse because one nurse who was going to come in had cancelled out and no replacement was yet available. She testified that she had a heavy workload that evening and that Miss Berges sent her and others to “cover” patients while she started to take night report. She said that the next thing that happened was that the arrest cart was going down the hall. Because she saw Mrs. McArthur go with the cart, she walked into the room where the expired gunshot wound patient was located to attend to matters there. She then carried on with her duties. She testified that the staff had been trying to document workload episodes in the unit because they believed there was a shortage of staff. She said the nurses at work that night, including Cathy Berges, Irene McArthur, and herself, concluded it had been an unsafe situation in the unit and that it would be worthwhile to take down documentation on how the patient died. This documentation was submitted to Mrs. Jan Dusek, their floor representative, the next day and, in turn, was given to the grievor, Mrs. Mancini. She testified that workload documentation was always written up and submitted to the floor representative responsible to deal with it. She testified that the document subsequently was discussed with a number of nurses including the grievor, Mrs. Dusek, Cathy Berges, Irene McArthur, Gladys Saxton, Sandy Soyko, the witness, and Laura MacPherson. It was her testimony that there were fourteen monitored patients that evening. She said it was left with the grievor to deal with the respondent and speak to Miss Low. She said she had not been approached by anyone in the respondent’s management about the incident since she had submitted the documentation to the grievor.

20. Mrs. Irene McArthur testified that she has been an ICU nurse for the respondent for 11½ years. She testified that, at the time of the incident, she was at the nursing station completing her nursing notes. She said that Miss Berges was there but with her back to the monitor. She said that she glanced up to the monitor and said to Miss Berges, “Look at the monitor”. Miss Berges then exclaimed that the patient was in VT. She said that Mrs. Berges was otherwise engaged in paper work relating to the expiry of the gunshot wound patient. She testified that she and Mrs. Lennard then grabbed the arrest cart and proceeded to C3 west. She was concerned about the incident because there had been no full-time monitor nurse and it had been only fortuitous that supervisors were present to help out by manning the cart. She felt that a full-time monitor nurse may have been able to help in this situation but she was not sure how long the person had been in VT. She testified that all the nurses felt a sense of frustration and wished that they could have done more for the patient. She stated that no one could really say what would have happened had there been a full-time monitor nurse on duty and that this uncertainty bothered the nurses. She said she attended a meeting with the grievor a couple of weeks later when the incident was discussed. She further testified that from the date of the incident until the beginning of July she was not interviewed by any member of management about the matter. In August she was asked to write out a report for Miss Low and in this document she did not point out that she saw the patient’s condition on the monitor first. Rather she wrote, “We noticed the patient on monitor appeared to be in ventricular tachycardia”.

21. Cathy Berges testified. She was the charge nurse and at 23:00 had received a report

from the outgoing charge nurse. Mrs. Booth was the monitor nurse on the earlier evening shift and Marjory Anne Rose was to be on monitor duty for Miss Berges' shift. However, when Miss Berges came on duty, she was told that a nurse had cancelled at the last minute and the hospital was looking for a replacement. Thus, Miss Berges' shift had one less nurse than the previous shift and she therefore took over the monitor after having put Mrs. Rose on the floor. Mrs. Booth stayed until 23:40 and ran strips for all of the monitors. Miss Berges reviewed the strips right after taking report in order to impress on her mind the normal patterns for the various patients. She testified that a junior nurse, Miss Rogers, was on the floor for her first night in the unit. Miss Berges gave her a quick idea of what the night routine was and, at about this time, Mrs. McArthur, who was looking after the gunshot patient, came out of that room to say that the patient was deteriorating rapidly. Miss Berges asked Miss Rogers to stay at the monitor while she went to examine the gunshot patient. She testified that she probably went into a number of other rooms at about the same time but very quickly. She returned to the monitor and asked Miss Rogers whether there was anything new and Miss Rogers replied in the negative. She testified that shortly after Mrs. McArthur came to the station and said her patient looked like he was really "going" and Miss Berges started to document strips of a dying heart. She also placed a call to the family of the gunshot wound patient. She testified that she then began looking for death certificate papers and was having difficulty finding them because the physical arrangement at the station was new. When she did manage to locate the forms, she turned around and saw the VT on the monitor. Miss Berges did not recall where Mrs. McArthur was at the time but Mrs. Butler was nearby on the telephone. She did not recall Mrs. McArthur drawing the VT to her attention. Miss Berges advised the people around her of the problem and went to the monitor to run a strip. She also called C3 west and someone there advised her that they were having a "terrible" time with the patient. She replied that the patient was in VT and that an arrest cart was being sent down. She dispatched Mrs. McArthur and Mrs. Lennard to C3 with the cart. Miss Berges said the nurses felt it was an unsafe situation because there was no full-time monitor nurse and because there were limitations on who could be sent with the arrest cart. She further testified that she was concerned that the VT was not discovered until it was already in effect. However, she estimated that there had only been a 60 second interval between her observations of the monitor. The incident caused the nurses sufficient concern to report it to the head nurse and document it for the complainant who would take it to Miss Low. She said a monitor nurse might have caught the VT more quickly and that one or two minutes could make a difference. In her view it would have been better to have had a monitor nurse on duty that evening but she hesitated to say that the patient would have received better treatment. She simply did not know. She testified that no one connected with the management of the respondent spoke to her from the time of the incident until July 4. She apparently was not contacted until August by Miss Low when she was asked to write up a report. This report reads:

April 30, 1980

2300-0700 Shift

11 patients in ICU

5 Registered Nurses

One nurse who had been called in was unable to come at the last minute.

Mrs. Irene McArthur looking after Mr. S. unconscious and in critical condition from a gun shot wound.

Mrs. Chris Cheeseman and Miss Heather Rogers to care for remaining

10 patients. It was also Miss Rogers' first time on night shift in the General Hospital. Miss Marjorie Rose assigned to monitor duty was put on the floor.

Myself as charge nurse would watch the monitor until help could be obtained or when Mrs. McArthur's patient expired she would be assigned to monitor duty.

Report finished at about 2340. Mrs. Velda Booth watched the monitor during this time and ran monitor strips and read them for me. As Mrs. Booth went off duty she informed me to watch especially a Mrs. S on telemetry on another floor as her cardiac pattern would change at times.

I checked over the monitor strips comparing them with the monitor as to rhythm and rate.

At about 2355 or so Mrs. McArthur came to the desk to say Mr. S's condition was deteriorating.

Also Miss Rogers came to me asking about our routine on night shift. I quickly gave her a rundown of our duties. I wanted to look at some of the patients and especially Mr. S. I asked Miss Rogers to watch the monitor while I was gone — about 3-4 minutes. She reported no drastic changes in the monitor patterns when I returned.

I notified the family of Mr. S. that he was much worse. Looking at the monitor there were changes in Mr. S's pattern and I started running a strip. A call was placed to the night supervisors who said they were on their way up. They arrived in a couple of minutes and then Mr. S. expired shortly after. Miss Butler came to the desk to make several phone calls in regard to this death.

During this time, I remained in the desk area looking at the monitor every few minutes checking Mrs. S's pattern first. No undue changes were noted while I was looking for the required death forms that had to be filled out. I looked at the monitor and saw that Mrs. S. was in ventricular tachycardia. I went to the monitor and started running a strip and called the floor, telling the nurse her patient was in V.T. and that I was sending down the arrest team. Mrs. McArthur and Mrs. Lennard ran to the floor while Miss Butler put in the arrest call.

The patient subsequently died despite treatment. When Mrs. McArthur returned to the floor and had cleared up matters regarding her previous patient, she took over watching the monitor at about 0200 hours.

This is about as accurate as I can recall the situation from memory.

(Miss) Cathy Berges, Reg. N.

Upon cross-examination, she agreed that the staffing situation that night was a temporary

one. It was also expected that the gunshot wound patient would expire and that she would send Mrs. McArthur to look after the monitors. This was the plan in any event. She also testified that Mrs. Booth, the 3 - 11:00 monitor nurse, had advised her at the commencement of the shift that the patient on C3 was having some difficulty and therefore she was concerned about her and paid special attention to her monitor. She further testified that she had returned from the gunshot wound patient and replaced Miss Rogers at about 5 minutes to 12:00. She testified that at 12:00 a.m. she was running monitor strips for the gunshot patient just before he expired. She said that she did not tell any of the nurses at their meeting after the incident that she had been replaced by Miss Rogers and, in discussing the situation with the grievor, no mention was made of this fact. She also acknowledged that while she did not speak to anyone connected to the management of the respondent before August 4, 1981, the two supervisors, Mrs. Butler and Mrs. Lennard, who had been beside her at the time of the incident, may have given reports to Miss Low. Her final comments were that she was not asked to get the death certificates and that it was the responsibility of Mrs. Butler. However, she was just trying to help out and expedite matters. At the time she observed the rhythm on the monitor she was going back and forth in the desk area. Lennard and Butler were there as well.

22. Miss Anne Gribben, Chief Executive Officer, of the complainant, testified. She stated that the Assessment Committee report was the first report to arise out of professional responsibility clause. She stated that the complainant experienced many problems in trying to encourage the respondent to implement the recommendations of the report. She felt that the recommendations under the heading "Safe Patient Care" were very critical and needed immediate attention. She did not accept that the recommendations had been fully implemented after the renovation had been completed. She acknowledged that the meeting of June 16, 1980 was the first face to face meeting of the complainant with the respondent over the report although there had been considerable correspondence between the parties. The key recommendations over which the complainant had concern were the increase in base staff; cost of monitoring of patients; and the constant surveillance of the cardiac monitors. She said there had been assignments of other duties to the monitor nurse and in her view this was totally out of tune with the recommendations of the report. She agreed that the death of the patient in C3 west was not the key focus of the meeting. The matter was, however, raised and Miss Low indicated she had investigated and believed the person had received the best of care. She testified that some of the representatives of the complainant found Miss Low's explanation inadequate but no one challenged her version at the meeting, or indicated that the complainant was unsatisfied. Miss Gribben did, however, think that she had made it clear that the complainant did not accept the response of the respondent to the report and, indeed, she gave the respondent 48 hours to implement the required staffing pattern and the continuing surveillance of the monitor before she made the report public and referred it to the Minister. She further testified that Mr. Robinson told her that the respondent needed time because he had written to the Minister asking for an outside study of the problem. Miss Gribben indicated that the complainant was not interested in further study.

23. Miss Gribben described the press conference held on June 18. She chaired the meeting. She made an opening statement and submitted herself to questions. A reporter asked why the report was important and how the issues affected the public. She and other members of the complainant explained in general terms. They were then asked by the press if they were aware of any situation that had been unsafe. At this point, she and other representatives briefly touched on the death of the patient of C3 west. Miss Gribben said she was very concerned about mentioning the patient's death and to this extent down-played it. However, she thought

it was important for the public to be aware of the situation although she tried to make it clear that the outcome may not have been different. In her view, mentioning the incident was “just another way to stress the need for concern for patient care”. On cross-examination, she testified that she obtained her information from the grievor. She revealed that at no time was she familiar with the fact that Miss Rogers was put on the monitor during Miss Berges’ absence. She said that she was under the impression that the monitor had been left unattended for five to ten minutes. In speaking with the nurses in the ICU, she said that it was very much in their minds that something else could have been done although, she stated, “we will never know”. She also could not recall whether she was aware at the time of making the public statement that Mrs. Butler and Mrs. Lennard were at the nursing station near the monitors.

24. Mrs. Cathryn Mancini has been employed by the respondent since 1977. She was president of Local 26 at all times relevant to this matter. She testified that the day after the patient on the monitor expired (Mrs. S.), the floor representative got in touch with her about the concerns of certain nurses in the ICU. She asked the floor representative to get the information and get the nurses to compile a letter that they could meet about and discuss. She met with the affected nurses in the first week of May. At the meeting she was presented with a set of notes and she proceeded through them asking questions and making notes of her own. People at the meeting included Cathy Berges, Irene McArthur and Marjory Rose. She said they were concerned that the inadequate staffing would persist. She was told that the monitor nurse had to be taken away so that patients would receive adequate care elsewhere. Mrs. Mancini wanted to know what the charge nurse was doing when the incident was happening. She asked questions in this respect and added some information to the notes. Her impression from the meeting was that the nurses were very busy and that the charge nurse was under extreme stress because of the death of the gunshot wound patient. While her initial testimony was far from clear on the point, on cross-examination she testified that from the information she received, she “believed” that the charge nurse, Miss Berges, was in the desk area looking for forms and that as she was doing that, she turned and noticed the patient in VT. She claimed that this is what she meant in making the public statement that she did. Mrs. Mancini said she believed that Miss Berges did not see the patient go into an erratic rhythm. Mrs. Mancini asked the other nurses at the meeting if anyone had seen the rhythm when the VT commenced and no one had. Mancini then asked where the supervisors were at the time and was told that Mrs. Butler was on the telephone and they were not sure where Mrs. Lennard was except that she was not at the monitor. Thereafter, she arranged a meeting to discuss the concern with Miss Low. This meeting took place a couple of days later. At the meeting with Miss Low, Laura MacPherson and Gladys Katz were in attendance. The grievor had all the various notes she had taken before her and referred to the notes when she wanted to convey certain statistics to Miss Low. She told Miss Low that she had received some of the notes from nurses on the floor. Miss Low did not ask for copies of the notes but said that she would look into the matter and get back to Mrs. Mancini. Mrs. Mancini could not remember any reply by Miss Low until the meeting of June 16, 1980 when Miss Low said that she had investigated the situation and was satisfied that the patient had received adequate care. Miss Low advised that she had gone through the coroner’s report and the patient’s chart. Mrs. Mancini said it appeared that Miss Low was telling Mr. Robinson this for the first time and that he did not appear to be aware of the incident. The grievor stated that at the same meeting Miss Low went on to say that it did not matter that the patient had taken the telemetry equipment off to go to the bathroom. This comment undermined the Director’s credibility with the nurses attending on the complainant’s behalf in the sense that they concluded Miss Low did not understand the monitoring equipment properly and that she was confused. The grievor on cross-examination

testified that she believed Miss Berges told her that she had a nurse watching the monitor while she was doing normal rounds but she was not advised who the nurse was.

25. The grievor could not repeat exactly what she said to reporters. However, it was her recollection she said the patient did not die due to a shortage of staff but that in another case it could be the direct cause of death. She did not recall saying that she could not "rule out" the patient's death because of a shortage of staff. Mrs. Mancini said virtually nothing throughout the major portion of the press conference and, indeed, was at the back of the room when Miss Gribben spoke. She denied that any attempt was made to sensationalize the patient's death. Her comments were in response to a question posed by the local media and at that point she was trying to "keep everything in its place". She said that she did not want the press to think "that the charge nurse was running around willy-nilly slapping the unit together". She thought it could have been "a lot worse" if she had told everything that was going on at the time. She testified that on June 19th when she was approached by Low she was only asked if she knew the patient's name. Low did not ask where the grievor got her information from and whether a proper investigation had been conducted. She said that there was no further attempt by the management of the respondent to investigate her conduct before a complaint with the College was laid. She testified that Miss Low spoke with her after the laying of the complaint and she recalled Miss Low saying that the grievor was "being used" by the Toronto head office of the complainant who wanted to make an example of the respondent. The grievor replied that she was "doing this for the nurses in the ICU and not for the good of [her] health". The grievor was cross-examined extensively on her statement to the press reproduced above as statement #1. She testified that she knew that Miss Berges had been replaced by Miss Rogers and in the public statement she was really referring to Miss Berges assisting with the death forms and thereby being distracted from the monitor. She denied saying that a patient died because a nurse left her post but admitted that she did not take any steps to have public reports to this effect corrected. She also could not explain where Miss Gribben got the impression that Miss Berges had been away from the monitor for "ten minutes" as was reported in the newspaper report set out earlier in this decision. She agreed, however, that "we were leaving it open to infer" the death was related to under-staffing. She further testified that when Gribben spoke about the death and a "5-10 minutes interval" she tried to get Miss Gribben's attention but, because she was located at the back of the room she was unable to do this. She ended her testimony by saying that at the time she spoke she believed what she said to be true and that she was never approached by the hospital to seek a retraction.

25. Mrs. Marilyn Lennard testified that she was one of the supervisors and has been a nurse for 29 years. She has worked in the ICU for 9½ years and has been a supervisor there for 4 years. She was at work on April 30, 1980 at 11:00 p.m. She was told that someone had phoned in sick for the ICU and that it was not possible to get a replacement as of that time. She was also told that they expected the gunshot wound patient to expire shortly. Indeed, the nurses on the earlier shift had expected him to die before 11:00 p.m. Soon into her shift her fellow supervisor, Mrs. Butler, received a call indicating that the gunshot wound patient was deteriorating. She and Mrs. Butler went upstairs to the ICU. They had a quick look into the waiting room for the relatives of this patient and then went on to the patient's room. On arriving there, a location which was directly across from the nursing station, Mrs. McArthur told them that the patient "had gone". Mrs. Butler then left the room and proceeded to the nursing desk where Miss Berges was located. Mrs. Lennard stayed back with Mrs. McArthur for a few moments and testified that as she crossed the hall to the nursing station she looked up to view the monitors and they looked normal. A telephone call was placed and, to the best of Mrs.

Lennard's recollection, Miss Berges then looked at the screen and said that a patient was in VT. The arrest carts are kept at the nursing station and Mrs. McArthur and Mrs. Lennard grabbed the cart and proceeded to C3 west. Mrs. Lennard testified that it was a matter of seconds between the time she looked at the monitor and the time Miss Berges observed that there was a VT. When she and Mrs. McArthur arrived at C3 west, Mrs. Lewis was already in the patient's room and a Dr. Merrill came in just after Mrs. Lennard and Mrs. McArthur. A nursing assistant was also in the room and an orderly came in just behind the two supervisors. A full arrest procedure was undertaken and Mrs. Lewis had already commenced this procedure before anyone else had arrived. The patient, however, could not be saved. Mrs. Lennard believed that the patient got a faster arrest procedure than normal because Mrs. McArthur and herself were immediately at the nursing station. They did not have to be called. Because the patient had got up just before the incident to go to the bathroom, Mrs. Lewis and Mrs. Morrison, a registered nursing assistant, were immediately available as well. In fact, Mrs. Lewis and Mrs. Morrison knew something was wrong before they had received the call from Intensive Care. She testified that one of the nurses filled out an accident or incident report and no one connected with the matter mentioned that the procedure for the patient was less than adequate. She said that she did not know of any concern until she read about it in the newspaper. In her view a shortage of staff had no bearing on the patient's death. Mrs. Lennard did not see Miss Berges leave her post while she was at the nursing station and at the time of the incident, the gunshot wound patient was already dead. Therefore, she did not accept the grievor's public statement as an accurate or true representation of what actually occurred. Mrs. Lennard was not aware of all the written reports submitted to the grievor by the other nurses but she was the one supervisory nurse who would have known the most about that evening. Sometime after the incident was reported in the press following the complainant's press conference, she spoke to Miss Low and prepared a report for her dated June 20, 1980. Quoting from the report, we note the following narration of events pertaining to the monitors.

"Miss Berges was at the desk and Miss Butler and I standing at the desk, heard Miss Berges say that patient is in 'VT' on C3W. Mrs. McArthur who was no longer required to be with the gunshot wound patient and myself, grabbed the arrest cart and started running for C3W. Miss Butler called switchboard to say 'Arrest'. At the same time down on C3W, Mrs. B. Lewis apparently now was aware of the patient's condition and she called the arrest who arrived there immediately before Mrs. Lewis really had had time to do very much. The patient had a full arrest procedure done for almost an hour in which time Dr. Gruber had been contacted. The patient was intubated, shocked, brought back with a pattern, went on to lose the pattern, brought back again. Everything was done for the patient that could have been done for her and we were there for almost an hour, as I say.

Dr. Gruber was called twice during this time by Miss Butler and told of the patient's condition. The patient expired. Dr. Gruber came in and the coroner was notified. However, when Miss Butler and I were in ICU, if Miss Berges had been away from that monitor at any time, she was fully responsible for the monitor because she had sent the monitor nurse to look after a patient. She said the patient is in 'VT'. She was standing at the monitor and said VT and that is when we ran. That patient got excellent care actually on C3W because we got there even faster than would have

been if they had had to call an arrest and had the team go from there and then asked to be called from somewhere else, as we were both there, we could go right from the unit.”

Miss Low did not tell her why the respondent wanted a written report nor did she suggest that Mrs. Lennard speak to other ICU nurses in preparing the report.

SUBMISSIONS

26. On behalf of the respondent, it was submitted that the complainant had failed to establish that the complaint to the College had been filed, either in whole or in part, on the basis of an anti-union motive. He stressed that the respondent was concerned that there had been no basis for the grievor's public statements; that she had been told on at least two different occasions that this was the case; that the intent of the public statements was to dramatize or sensationalize the situation and discredit the respondent in order to achieve the complainant's political goals; and that the grievor had no direct knowledge of the incident. It was further submitted that the grievor owed a duty of loyalty to the respondent to the extent that if she was going to make a public statement that could potentially damage the respondent, the statement had to be accurate and correct. It was submitted that this was particularly so in light of the grievor's position as a professional. From this viewpoint, counsel submitted she shouldered a responsibility to be properly informed before speaking out. In support of the obligation of an employee to serve his employer with good faith and fidelity, the respondent relied upon *Regina v. Fuller et al Ex parte, Earles and McKee*, [1968] 2 O.R. 564; *Re U.E.W. Local 524 and Canadian General Electric Company Limited* (1958), 9 L.A.C. 83 (Fuller). In support of the submission that an employee is not entitled to disparage his employer publicly, the respondent relied upon *Re Office and Professional Employees International Union, Local 263 and Lord N. Burnham Company Limited* (1972), 24 L.A.C. 218 (Hanrahan); *Re Bell Canada and Communications Workers of Canada* (1978), 22 L.A.C. (2d) 119 (Springate). In support of the submission that the grievor, as a union official, did not have an unfettered licence to disparage the reputation of the respondent, reference was made to *Re Corporation of the City of London* (1978), 19 L.A.C. (2d) 147 (Kruger); *Re Chedore* (1981), 29 L.A.C. (2d) 42 PSSRB, (MacLean); *Re Firestone Steel Products of Canada* (1975), 8 LAC (2d) 164 (Brandt); *Arthur J. Stewart*, 166-2-200, August 12th, 1975, PSSRB (Jolliffe), upheld [1978] 1 F.C. 133; *Robert Goyette and Gerard Guidon v. Treasury Board*, 166-2-2914/2915, July 22nd, 1979, (Grant). Counsel for the respondent also drew the Board's attention to a number of American cases bearing on the issue. They included *NLRB v. Electrical Workers* (1953), 33 LRRM 2183 (USSC); *Coca-Cola Bottling Works Inc.* (1970), 186 NLRB 1050 (Miller); *University of Southern California* (1978), 349 CCH NLRB, 20,200.

27. On behalf of the complainant and grievor, it was submitted that the respondent had, by lodging the complaint with the College, sought to retaliate and prevent further public discussion on the Assessment Committee's report. It was submitted that the grievor, as a trade union official, had a statutory right (on the basis of section 3 and section 64 of the *Labour Relation Act*) to make public comment on the report as she did. The report, it was submitted, arose out of a provision contained in a collective agreement and was, therefore, a proper labour relations concern of the complainant association and the grievor as local president. Counsel to the complainant emphasized that the professional responsibility clause in the agreement between the complainant and respondent was a new concept in hospital collective bargaining and one that the respondent had opposed from its inception. Counsel further

submitted that the Director of Nursing was very concerned about the complainant's threat to make the report public and that this concern culminated in the improper and unlawful actions taken by the respondent after the press conference was held. Counsel emphasized that the respondent itself failed to investigate the incident properly and that little purpose would have been served by the nurses or the complainant lodging another complaint under the professional responsibility clause. Finally, it was submitted on behalf of the grievor that the issue was not whether the grievor's comments were true or untrue but rather whether the respondent's actions were intended to punish the grievor for exercising a right under the legislation.

Decision

28. We find that the grievor spoke to the media as recorded in statement #1 above. We find that the grievor was not aware that Miss Berges had been replaced by Miss Rogers when she went to see the gunshot wound patient and that her investigation led her to believe that Miss Berges noticed that Mrs. S. was in VT when she returned from seeing the gunshot wound patient. We further find that it was this perception of what happened that caused the grievor and the nurses with whom she conferred to be concerned in that Mrs. S.'s monitor may have been showing an irregular rhythm in Miss Berges' absence. We are also satisfied that the nurses on C5 were under considerable pressure at the time of the incident because of the absence of one nurse and the presence of the gunshot wound patient who required "one to one" attention. There can be little doubt that these circumstances, together with the death of two patients, magnified the existing concern over adequate staffing in the minds of the affected nurses. Understandably, any uncertainty in the minds of these employees over whether more could have been done to save the life of a patient would have caused significant personal frustration. We are satisfied the grievor received the full force of these frustrations at the meeting she held to inquire into the situation. We are also satisfied that the incident was raised in good faith and promptly with the respondent. The incident occurred on April 30. It was brought to the grievor's attention on May 1. She held a meeting with other nurses soon after, and then scheduled a meeting with Miss Low on May 9, 1980. It was not, in our view, a "manufactured" concern aimed solely at supporting the complainant's efforts to have the Assessment Committee's report implemented.

29. However, the grievor's understanding of the incident was inaccurate and this inaccurate understanding was conveyed to Miss Gribben and the press. In fact, Miss Berges was replaced by Miss Rogers for that period of time during which she visited the gunshot wound patient and possibly a few other rooms. When she returned Mrs. S.'s monitor was normal and Miss Rogers did not report any problem. It was only after Miss Berges' return to the nursing station, and while she was looking for certain death certificate forms, that she observed Mrs. S. in VT. Having regard to the grievor's public statement and the testimony of her fellow employees and Miss Gribben, we cannot and do not accept the grievor's testimony that she was aware that Miss Rogers replaced Miss Berges. Miss Berges, in giving her testimony, was obviously concerned that she had not observed the commencement of the VT and obviously this was because she was not certain how long an interval had passed between observing the VT and preceding time she had looked at the monitor. She estimated sixty seconds but it may well have been longer and she could not be certain given the distractions at that particular time associated with the gunshot wound patient's death and her charge nurse responsibilities. It was this uncertainty that was conveyed to the grievor and not the precise facts surrounding Mrs. S.'s death. Mrs. Lennard testified that she had looked at the monitor only seconds before Miss Berges announced a VT and observed a regular pattern. She said she then looked at it again

and when she saw the irregular pattern she drew it to Miss Berges' attention. Unfortunately, her note of June 20, 1980 provides none of this detail and the version contained therein was very incomplete if her testimony before this Board is accurate. Her recollection of first seeing the VT is also inconsistent with Miss Berges' testimony.

30. Having regard to all of these circumstances, we find that the interval between the observations of the monitor by any nurse was at least sixty seconds and could well have been an additional minute or two longer. However, the evidence suggests that even a full-time monitor nurse could reasonably let such an interval pass when performing other minor but normal duties and therefore the situation at that precise moment was not irregular. Moreover, we are satisfied that any short delay in discovering the problem was more than compensated for by the immediate availability of Lennard and McArthur to handle the arrest cart. Accordingly, any particular staffing problem experienced that night or any ongoing staffing problem of the kind examined by the Assessment Committee's report did not contribute to Mrs. S.'s death in our opinion. We are satisfied on the evidence that everything that could have been done was done.

31. It is true that a more complete inquiry by the grievor and complainant association may have led them to the same conclusion and avoided any adverse impact of the grievor's public statement on the respondent. It is also true that a complaint file by the complainant or grievor under Article 33 of the collective agreement would have caused an investigation that also may have arrived at the same conclusion. In both instances we have used the word "may" because the College conducted its own inquiry and came to the conclusion that the grievor's statement was "substantially correct". It is fair to assume that Article 33 was inserted into the agreement to provide an opportunity for factfinding in similar situations. In our view it is no answer, as submitted by the complainant's counsel, that a second report would have been of little value. It would have been of considerable value in demonstrating what actually occurred on the occasion in question and would also have provided an opportunity for an outside body to examine the significance of the physical renovations to the earlier report. Instead, the complainant proceeded "full steam ahead" to its press conference and its attempt to put public pressure on the respondent to implement the complainant's interpretation of the Assessment Committee's report, a report that was recommendatory only and representing "a stimulus for reflection". It appears to this Board that the grievor was, by virtue of her office and the complainant's tactics, drawn into a situation over which she had very little control. It was Miss Gribben who first mentioned the incident involving Mrs. S. to the press and she gave a liberal interpretation of the grievor's inaccurate understanding which could have only heightened media interest. The grievor then compounded the problem by giving her version when asked.

32. However, we are satisfied that neither official (Gribben or Mancini) went to the press conference with the express purpose of mentioning the incident in that it was not part of Miss Gribben's initial presentation. The statement was made in response to questioning by media representatives and, after it was made by Miss Gribben, the grievor's comments were somewhat inevitable and possibly surplus. The grievor was, however, the source of Miss Gribben's information, and therefore, she cannot escape responsibility on this basis. We are also satisfied that when the grievor spoke she believed what she said to be accurate and any doubt that she had over what happened that evening was conveyed to the press by her use of tentative language. This language was picked up in many of the newspaper reports and other media presentations. There can be little doubt, however, that the incident was given to the press by Miss Gribben to dramatize the complainant's dispute with the respondent over the report and to bring public pressure on the respondent. The matter having been raised, it was

somewhat inevitable that the grievor would be encouraged to make public comment as well. The issues before this Board are whether the grievor is entitled to the protection of the *Labour Relations Act* in having acted as she did and, if so, whether the respondent improperly attempted to interfere with the exercise of her freedom under the statute by filing the complaint with the College of Nurses.

33. Before proceeding to deal with these legal issues, the respondent's conduct needs greater analysis. The grievor raised an exceptionally important issue with Miss Low on May 9, 1980. Miss Low knew that the grievor was conveying the concerns of number of nurses who had been working in the vicinity of the incident and that they or the grievor had taken the time to record their concerns in writing. Miss Low also had to be aware of the ongoing concern of the nurses over the adequacy of staffing in the hospital in light of the Assessment Committee's report. Miss Low's actions and response fell considerably short of assuring the grievor and her fellow nurses that the concerns raised had been quickly and carefully reviewed. She did not ask for the notes in the possession of the grievor. She did not ask the grievor for the names of nurses she might interview. She did not say when she would get back to the grievor. On completing her investigation, Miss Low says she was satisfied. The investigation did not include personal interviews of many of the key nurses, particularly Miss Berges, and we are not certain on the evidence that even she knew, as of June 16, 1980, that Miss Rogers had replaced Miss Berges. She testified that she informed the grievor of her conclusion in a "casual" encounter in a hallway sometime before June 16, 1980 but, unsurprisingly, the grievor has no recollection of that chance meeting. If it occurred, it was not a satisfactory way to respond to such a serious complaint. An informal response of this kind can easily lead to a misunderstanding over the completeness and reliability of the respondent's investigation. Miss Low's response at the June 16, 1980 meeting was not much better. By failing to detail her understanding of the incident and who she had contacted she left questions surrounding the accuracy of her understanding. Indeed, there is the distinct possibility that the Executive Director of the hospital was not aware of the charge until June 16, 1980. Thus, "two sides" or two versions of the incident were allowed to challenge each other. In our view, it is in the respondent's interest to avoid the filing of complaints under Article 33 if at all possible, but the provision of so few details as in this instance can only encourage the formalization of such grievances.

34. In considering whether the grievor's actions are protected by the *Labour Relations Act* regard must be had to section 3 and 64. They provide:

3. Every person is free to join a trade union of his own choice and to participate in its lawful activities.

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

35. There is no doubt that a substantive protection for the legitimate activities of trade unions flows from these sections. In *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254, the Board was

confronted with the discipline of a union steward for, as the Board found, pursuing the grievance of a fellow employee who had been discharged. In finding that the grievor was exercising a statutory right by her actions as a union steward and that the respondent had intended to interfere with this right, the Board wrote:

In our view, the absence of previous conflict between Dragon and the Grievor; the grievor's good relationship with her immediate supervisor, Keith Walker; the grievor's superior job performance; and the fact that her dismissal followed on the heels of her actions as union steward in the Carol Etserig matter, all go against Dragon's assertion that he had simply got up the nerve to implement the previous advice of Messrs. Ludgns and Black. The grievor's proper actions as union steward are not only supported by the collective agreement between the parties but by section 3, 42, 56, 58 and 61 of *The Labour Relations Act*. The grievor, Local 175 and the other employees in the bargaining unit all have statutory rights to this effect. The grievor has a statutory right to act as she did. Her fellow employees have a statutory right to be so represented. And Local 175 has a statutory right to have employees act as union stewards on its behalf. In our view, these rights are fundamental to effective collective bargaining and contract administration. See *J. Harris & Sons Ltd. et al* (1960), 60 CLLC ¶ 16,177.

36. A similar approach to section 3 was elaborated in *Imperial Tobacco Products (Ontario) Limited*, [1974] OLRB Rep. July 418 where at paragraph 25 it was stated:

In the alternative, the Board rules that it was proper to join the individuals and employer based upon the allegations of conspiracy to defeat rights of the complainants under the Act. Surely if an individual or employer assists or causes a trade union to act contrary to the requirements of section 60, that individual or employer is a proper party to the proceedings based upon that section under section 79. In this regard, the National Labor Relations Board has held that an employer and a trade union will be jointly and severably liable where both have discriminated against an individual and the fact that the employer yielded to union pressure does not appear to be a defense. (*Imparato Stevedoring Company and International Brotherhood of Longshoremen*, 113 NLRB 883; *H. Milton Newman et al and Local 456, Teamsters*, 85 NLRB 725). Surely the wording found in section 58, 61 and 79 is broad enough to embrace such a theory of liability.

For instance, section 3 of the Act provides that "[e]very person is free to join a trade union of his own choice and to participate in its lawful activities." One lawful activity must be the enjoyment of rights derived under a collective agreement as these rights are administered by the trade union bargaining agent subject to the requirements of section 60. (For a somewhat similar use of section 3 in relation to the right to strike see: *Regina v. Canadian Pacific Railway Co.* (1961), 31 D.L.R. (2d) 209 at p.218 and *C.P.R. Co. v. Zambri* (1962), 34 D.L.R. (2d) 654 at p.664). Section 60 provides that the trade union must "not act in a manner that is

arbitrary, discriminatory or in bad faith" in regard to such people. It is therefore possible to say that a person has a right to participate in these lawful activities of a trade union (ie) enjoying the rights derived from a collective agreement, without being dealt with in an arbitrary, discriminatory or bad faith manner, and accordingly, if an employer assists a trade union in violating its duty under section 60 it can be argued that the employer may be in violation of any or all of the subsections of section 58. Similarly, where individuals cause or assist a trade union to violate its duty under section 60 it can be argued that section 61 has been violated in that the actions of those individuals have coerced someone "to refrain from exercising any other rights" under the Act. Moreover, it could be argued that the same actions have coerced the trade union "to refrain from performing any obligations under the Act." And, a remedy for both of these alleged violations could be sought under section 79(1)(a) and 79(4)(a).

37. A recent judicial recognition and application of the rights flowing from section 3 is found in *Re United Steelworkers of America, Local 2900 and Inglis Ltd.* (1977), 77 D.L.R. (3d) 722. In that case a board of arbitration found that a union steward had grossly misconducted himself by urging employees to perform below the required level of performance. However, the grievor had been discharged and the board considered that penalty overly severe. It therefore reinstated the grievor on the condition that he could not hold union office for a fixed duration. In quashing the imposition of that condition, the Court relied upon section 3 and section 64 (then section 56) in writing:

Since the decision of the Supreme Court of Canada in *McLeod et al. v. Egan et al.*, [1975] 1 S.C.R. 517, 46 D.L.R. (3d) 150, 2 N.R. 443 *sub nom. Re MacLeod*, it is no longer in doubt that the principle which allows an arbitrator to construe a collective bargaining agreement in a sense which the words thereof will reasonably bear regardless of whether the reviewing Court would reach the same conclusion does not apply to the construction of a public enactment such as a statute or a by-law. No "curial deference" to use Laskin, C.J.C.'s arresting phrase, will be accorded such a construction when the reviewing Court construes otherwise. We are of the opinion, therefore, that if the learned arbitrator thought that he was justified by the provisions of s.37(8) of the *Labour Relations Act* in imposing the penalty he did which was not specifically provided for in the collective bargaining agreement, he erroneously failed to apply the provision of s.3 which guarantee to the grievor the right to participate in the lawful activities of his union, and of s.56 in compelling the employer to interfere in union representation by accepting a self-denying undertaking from him.

He had no jurisdiction to do this and accordingly the award must be set aside and the matter remitted to the learned arbitrator to proceed in accordance with the principles enunciated by the Court. Since the difficulty arose, as we respectfully suggest, of the learned arbitrator's own motion as it were, we think there should be no costs.

38. The Supreme Court of Canada has also recently considered the effect of a statutory

provision resembling section 3 in *Gralewicz v. The Queen*, [1980] 2 S.C.R. 493. In that case, the accused had been charged with conspiring to effect an unlawful purpose contrary to section 423(2)(a) of the *Criminal Code*, in that they had prevented members from engaging in the lawful activities of their trade union contrary to section 110(1) of the *Canada Labour Code*. That section provides:

Every employee is free to join the trade union of his choice and to participate in its lawful activities.

The Court allowed an appeal by the accused and restored the order of the Provincial Court judge quashing the information on the grounds that it did not disclose an offence known in law. The majority of the Court held that "...to prevent members of a union from participating in the lawful activities of their union is not necessarily unlawful..." since there was no explicit provision of the *Canada Labour Code* upon which a prosecution could be based for preventing members of a trade union from participating in the lawful activities of their union. The Court noted that the general prohibitions set out in section 186 of the Code related to union membership only, and did not refer to participation in the lawful activities of a trade union. Furthermore, the information charging the accused did not relate to the offences set out in section 184 and 185 of the Code which prohibit certain conduct by employers and trade unions. It appears that the Supreme Court of Canada has found that section 110 of the Code cannot be violated, but that the rights created by that section are protected by the specific unfair labour practice sections of the Code. The right to participate in lawful trade union activity under the *Canada Labour Code* is not unlimited, and interference with that right is violation of law if another section of the Code provides a protection for that right. The minority judgment of the Court recognized the limitation of the *Canada Labour Code* at page 497:

Section 110 of the Canada Labour code confers rights upon employees to join trade unions and participate in their lawful activities. ...it may be doubtful if any effective sanctions for the enforcement or protection of such rights appears in the *Canada Labour Code*...

but held that the *Criminal Code* provided the necessary provision to create an offence for interfering with that right. The *Ontario Labour Relations Act* differs from the *Canada Labour Code* in that it contains the "effective sanctions" against interference with the rights created by section 3 in, among others, sections 64, 66 and 70. Sections 66 and 70 provide in part:

60. No employer... or person acting on behalf of an employer...

(a) shall.. discriminate against a person in regard to employment because the person was or is... exercising *any other rights under this act*....

(c) *shall seek by threat of dismissal or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee... to cease to exercise any other rights under this Act.*"

70. No person... shall seek by intimidation or coercion to compel any person... to refrain from exercising *any other rights under this Act*.

[emphasis added]

Thus, the right created by section 3 is protected from violative conduct through sanctions set out in other sections of the Act. (See also *Frank Manoni and Labourers' Union, Local 527*, [1981] OLRB Rep. Dec. 1775.)

39. On the other hand, these statutory protections are not unlimited. An employee is not entitled to immunity from dismissal or discipline because he or she is a union adherent. See *Swingline of Canada Limited*, [1971] OLRB Rep. 765. For example, where an employee engaged in organizing activity on behalf of a union also engaged or was believed to have engaged in the threatening of other employees, the resulting discipline issued by the employer was held not to be contrary to the *Labour Relations Act* in *Toronto Star Limited*, [1971] OLRB Rep. Sept. 582. A not dissimilar limitation to certain rights and freedoms under the statute is revealed in *Kitchener-Waterloo Hospital*, [1977] OLRB Rep. Feb. 112 where a strong supporter of a trade union asked to consolidate her two 15-minute coffee breaks and her half-hour lunch break so that she could be away from work 11:00 a.m. to noon to take part in a protest against the Anti-Inflation Program. In dismissing the complaint the Labour Board framed and resolved the issue in the following manner:

11. Having reached this point we now turn to the issue of whether or not the respondent violated section 58(a) of the Act by first denying the grievor's request to alter the timing of her work breaks so as to allow her to attend a demonstration against the anti-inflation program even though it probably would have granted a similar request for certain other purposes, and by then refusing to reinstate her when she left work despite a warning that to do so would result in the termination of her employment. Section 58(a) states as follows:

"58. No employer, employer's organization or person acting on behalf on an employer or an employer's organization,

(a) shall refuse to employ or to continue to employ a person; or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;"

12. As noted above, we are of the view that the position adopted by the respondent with respect to the grievor's request was not aimed at severing her employment relationship with the respondent because of her activity on behalf of, or any possible membership in, a trade union. Thus if a breach of section 58(a) has occurred it must be because the respondent has either refused to continue to employ or refused to reinstate the grievor because she was exercising some other right under the Act. Counsel for the complainant argued that such a right was the right of the grievor pursuant to section 3 of the Act to participate in the complainant's lawful activities. The lawful activity involved, he submitted, was the demonstration against the anti-inflation program.

13. Attending a demonstration against the anti-inflation program is, of course, a lawful activity. However, what the Board in reality is being

asked to hold in this case is that the right to attend such a demonstration during regularly scheduled working hours is an activity protected by The Labour Relations Act. This we decline to do, even on the assumption that a demonstration is a union activity within the meaning of section 3 of the Act. While employees certainly have the right to participate in lawful union activities, this right does not go so far as to put a positive obligation employers to alter established work schedules so as to facilitate this participation. Further, the mere fact that an employer may voluntarily agree to change work schedules for certain specific purposes does not have the effect of creating a general obligation upon him to do so. Just as the respondent was free in this case to refuse a request by the grievor to have breaks consolidated so as to allow her the time to attend a political rally or a social event, so it was also free to disallow the change where she wanted to attend a union sponsored activity.

40. Thus, legitimate employer interests are not swept aside by the legislation. The legislation must be interpreted in the context of an employment relationship and the reciprocal responsibilities of such a relationship. In many cases, indeed most, the accommodation is made on the basis that the requisite unlawful intent of the employer is absent when he is seeking to protect a legitimate interest. *Swingline*, cited above, is a *locus classicus* in this regard. But this is not always the case. Sometimes the very actions of the employee to which the employer objects are alleged to constitute union activity which is protected by the statute. In these cases, some balancing of interests by this Board in light of the purposes of the *Labour Relations Act* is required in order to ascertain the limits of the employee or employer freedom claimed. *Kitchener-Waterloo Hospital*, *supra*, falls more directly in this category of cases. Fortunately, this Board has not been confronted with a great number of such cases.

41. One of the Board's cases closely resembling the situation before us in *The Board of Health Northwestern Health Unit*, [1971] OLRB Rep. April 256. There the grievor was a member of the union's negotiating committee which had reached an impasse in negotiation with the respondent health unit. She was instrumental in presenting a brief to the Town council which was reported in the local newspaper, a direct consequence of which was the immediate removal of a certain individual, a chairman of the health unit. The grievor was dismissed for participating in the presentation and sought relief before this Board. It was established that contents and presentation of the brief were never submitted to the membership for approval although the international representative and local union president concurred in both. Others on the negotiating committee knew of the brief and understood it "merely as a lever to pry the Board (e.g. the respondent) into fairer negotiations on its part." Unfortunately, the Board's decision does not detail or dwell on the particular contents of the brief. The employer's representative, however, stated that "when she took it upon herself to represent all of the employees of the health unit and make a statement in the open Dryden Council meeting that was defamatory if not libellous and full of untruths — I just couldn't put up with this". He also felt that the brief should have been initially presented either to the health board or its chairman or to himself. However, the Board did not have to balance the grievor's interest as a union official in speaking publicly on collective bargaining matters against the duty she owed her employer to serve with good faith and fidelity nor did it have to assess the precise content of the brief because of the conclusions (a) that she was not acting on behalf of the complainant trade union and, therefore, (b) the actions for which she was dismissed did not constitute union activity. We might point out that federal public sector cases have come to a somewhat similar

conclusion when union officials speak publicly on matters outside the restricted scope of collective bargaining. See *Re Stewart and Treasury Board*, File 166-2-200, upheld [1978] 1 F.C. 133; and *Goyette et al and Treasury Board*, File Nos. 166-2-2914 and 2915.

42. To the extent that the *Northwestern Health Unit* case seems to require that every action of a union official be submitted to the membership in order to trigger the status of union activity under the Act we would decline to follow it. While there may be circumstances where a union official would clearly be on a “frolic” of his own, the Act specifically recognizes by section 88(2) the concept of “scope of authority” with respect to the everyday action of trade union representatives. We decline to hold that the grievor before us, Mrs. Mancini, was not representing the complainant association in attending the press conference and making the statements that she did. She and the complainant were interested in the implementation of the Assessment Committee report which was a report prepared under the terms of the collective agreement between the parties. The report and the concerns of the grievor related to staffing. Staffing is a legitimate employee concern particularly in the context of nursing. Such issues have given rise to significant grievances and arbitral responses. See *Re Mount Sinai Hospital and Ontario Nurses’ Association* (1976), 13 L.A.C. (2d) 103 (Brandt). Nurses, as are other health care professionals, are legally accountable for their actions and can be joined in negligence actions arising out of inadequate patient care. See W. D. Griffiths, Q.C., *Claims For Contribution or Indemnity as Between Hospitals, Doctors and Others*, [1963] Lectures L.S.U.C. 237. M. W. Ross, *The Nurse as an Employee* in S. R. Good and J. C. Kerr, *Contemporary Issues in Canadian Law For Nurses* (1973) c.10; H. Krever, *Libility for Negligence* in S. R. Good and J. C. Kerr, *Contemporary Issues in Canadian Law For Nurses* (1975) c.11. We would also accept that, because of the involvement of patients, the matter was of potential interest to the public and it was this overlap in interest that the union officials sought to exploit. We must consider whether statements that seek to involve the public (as opposed to more inwardly directed statements at employees or the employer) constitute a protected lawful activity of a trade union under the Act and, if so, whether the precise content and circumstances of the grievor’s statements in the context of this collective bargaining relationship support her claim for statutory protection. We specifically reject the notion that statements must be “timely” to be even considered as trade union activity. Conduct giving rise to this type of problem can reasonably arise during an organizing drive; during negotiations; during grievance meetings; and on other ad hoc occasions. A collective bargaining relationship is an ongoing relationship. The adoption of timeliness considerations in analyzing alleged union conduct would create artificial rules quite inconsistent with the dynamics of collective bargaining.

43. In considering the issues before us a number of approaches are possible. One approach might be to hold that public disparagement of an employer is inconsistent with an ongoing employment relationship and never a lawful activity under the Act worthy of protection. This approach would seek to discourage attempts by trade unions to involve and inform the public although it would only do this in respect of employees. Full time union officials could carry on such efforts subject only to the laws of libel, slander and defamation. There would also be the problem of the press reporting statements directed to employees and the general interest of the public for explanations of particular industrial disputes. At the opposite extreme is the option of permitting employee union officials an unlimited licence to speak publicly about an employer provided the statements relate in some general way to the collective bargaining relationship. This approach would assume that employers could adequately respond in kind and that anything short of such total protection would have an undue

"chilling effect" on this type of union activity. An employer could still try to invoke the sanctions available to him in the civil courts and, in doing so, our courts would have to consider the relationship between statutory collective bargaining laws and the laws of libel and slander. In between these two polar positions are a variety of other options. This Board could impose procedural requirements of internal discussion and investigation by the parties before recourse is made to public statements. There might be the limitation that only true statements are to be made publicly with the risk that a statement is untrue residing with the maker. There might also be an approach protecting heated rhetoric and public statements made without malice. This latter approach would not protect statements known to be untrue or made recklessly without concern for truth or falsity but would seek to accommodate the fragile nature of speech rights and the inevitable emotions associated with labour relations.

44. Arbitration cases have, on a case by case basis, grappled with similar problems and have devised a number of useful principles. The court in *Regina v. Fuller et al, Ex parte Earles and McKee*, [1968] 2 O.R. 564, reviewing an arbitration award, emphasized that an employee is under a duty to serve his employer with good faith and fidelity and not deliberately do something which may harm his employer's business. Public vilification of an employer and its officers by individual employees does not have to be tolerated. See *Re Office and Professional Employees International Union, Local 263 and Lord & Burnham Co. Ltd.*, *supra*. Physical obstruction in the form of picketing "ostensibly" for the purposes of informing others, but in fact designed to impede employees at a secondary location, can be reacted to by an employer in the form of discipline. See *Re Bell Canada and Communication Workers of Canada* (1978), 22 L.A.C. (2d) 119 (Springate). See also *Re Edmonton General Hospital and United Nurses Association* (1980), 26 L.A.C. (2d) 393 (Anderson) where improper activity arose out of a public statement. A balancing of interests was undertaken by the arbitrator where an employer set limits on the freedom of its employees to speak out because of the particularly sensitive nature of the employer's business. This most interesting case arose in the context of the *War Measures Act* R.S.C. 1970 c. W-2 when the Canadian Broadcasting Corporation imposed guidelines on its employees involving themselves publicly in the related political controversy. See *CBC and NABET* (1974), 4 L.A.C. (2d) 263 (Shime). In concluding that the directives were permissible but with limitations the arbitrator wrote:

In the instant case we are concerned with an employer involved in an enterprise which differs considerably from the normal manufacturing plant. It is involved in communications which is a sensitive area. For example, in presenting a news broadcast whether by radio or television, the CBC must be conscious of its impartiality, and it is therefore of legitimate concern that the person communicating the news maintain an integrity that neither impairs the CBC's attempts at impartiality, nor its image of impartiality. That is not to say that there is not a subjective element in many news programmes-but nonetheless, we are prepared to take notice that there is an attempt to maintain an objective and impartial presentation of news. It is in areas such as this that the CBC has a real and direct concern.

The problem, of course, is to what extent can the interests of the CBC encroach upon the personal lives of the employees. Where is the line to be drawn? We do not think, for example, that the interests of the CBC in maintaining the image of impartiality would extend to interfering with

the political rights and freedoms of the machinists, wiremen or mechanical riggers in this bargaining unit. In those situations there is no legitimate or substantial reason for the employer to impose restrictions on employees who publicly engage in political controversies. The CBC has no further rights in these situations than the ordinary private employer. The issue is not whether the CBC will be embarrassed because some of its employees engage in political controversy.

Dealing with the *Canadian Bill of Rights*, Mr. Shime, Q.C. observed:

In another context the parties have presented argument concerning the relationship between the Canadian Bill of Rights, R.S.C. 1970, App. III (hereinafter referred to as the Bill of Rights), and the collective agreement. To some extent that argument is allied with the reasonableness of the rule. The values expressed in the Bill of Rights are indicative of not only prevailing community attitudes, but beliefs and values very strongly woven into our national fabric and to the extent therefore that an employer seeks to encroach on all those values it must have very cogent reasons for so doing. In this respect the Bill of Rights suggests a standard against which the reasonableness of the policy directive may be measured, and in our view suggests that there should be some limitation on the scope of the directive in so far as its reasonableness is concerned.

We point out that our determination to this point is only as to the reasonableness of the directive. Whether the company may properly discharge or discipline individual employees is subject to arbitration and the just cause provisions of the collective agreement.

The case, of course, did not assert nor did it concern any alleged right of individual employees under the *Canada Labour Code* to speak out on "political matters" but it is illustrative of an arbitral approach dealing with conflicting interests similar to those before us in this case. See also *Re Air Canada and Canadian Air Line Employees' Association* (1980), 27 L.A.C. (2d) 289 (Simmons). See also *Ministry of the Attorney General and British Columbia Government Employees' Union*, August 7, 1981 (J. M. Weiler) dealing with the so-called right to "blow the whistle".

45. Considerably more relevant are those arbitration cases where trade union officials have been disciplined or dismissed for engaging in heated rhetoric or public statements of an adversarial flavour. In *Re Firestone Steel Products of Canada and United Automobile Workers*, Local 27 (1975), 8 L.A.C. (2d) 164 (Brandt) a union steward pursued an employee's grievance in a vigorous, heated and profane manner for which he was disciplined. In overturning the discipline the arbitrator characterized the steward's behaviour as insulting but not insubordinate "for it is not necessarily to be expected that a union committeeman possess the charm and diplomacy of someone differently situated". He found it was not the grievor's purpose to threaten the supervisor. He had simply become angry and started to shout and swear when the supervisor refused to argue the matter. A similar result under similar circumstances was obtained in *Re Ormet Corporation and International Union of District 50, United Mine Workers of America* (1970), 54 L.A. 363 (Williams). In upholding the

grievance, the arbitrator outlined his understanding of the correct arbitral approach in writing:

Arbitrators carefully uphold the right of Union representatives to speak freely at Company-Union meetings. I can find no decision where discipline of an employee for words spoken as a Union representative to a Company official at a Company-Union conference, has been upheld. While the Grievant's words were harsh and unnecessary, they were spoken in the course of the Grievant's performance of his duties as a Union representative, and they were not intended to be personally abusive toward the Supervisor. During the meeting, the Company and Union representatives met as men of equal stature for the purpose of discussing the business at hand, rather than as superiors and subordinates. The very nature of the collective bargaining process is that an employee who is designated as a Union representative must be free to discuss Union matters as though he were not a Company employee. Otherwise, an employee would be inhibited in the performance of his duties as Union representative, by fear of discipline for the use of strong language. Furthermore, the Grievant's words were heard by no one outside the room, and possibly not even by Bourque himself; there was no adverse effect on production, and no affront to managerial authority.

The company is correct in saying that Company — Union meetings should be conducted in an orderly and gentlemanly manner. But as a practical matter of industrial life, they frequently are not. Tempers flare, voices are raised, and profanity is frequently used by both sides in the give-and-take atmosphere of such meetings.

In *Re Corporation of the City of London and London Civic Employees Union, Local 107* (1978), 19 L.A.C. (2d) 147 (Kruger) a local union president was disciplined because of a series of articles in the union's newspaper authored by the president and which the employer alleged to be defamatory of its personnel director. The articles had been written in relation to a recent change in sick leave policy to which the union took vigorous exception. The majority of the board of arbitration set aside the discipline holding that, with respect to the excesses in the articles directed at the personnel director, the grievor should have been given the opportunity to apologize publicly. In the board's view, this would have been more appropriate under circumstances where there was no evidence to support the charge that the director was harmed or that labour relations was harmed. Describing the wider latitude in permissible speech of union officials, the majority stated:

The Board also accepts the position adopted by other arbitrators that union officials have somewhat wider latitude in permissible speech than other employees when they are acting in their capacity as union officers. The union is by nature a combat organization. Its relationship with management must be in large measure adversarial. Leaders of unions must at times be belligerent toward management and at other times must stir up their troops for combat. Unions depend in large measure on volunteers from among the rank and file members to provide leadership. Their ability to lead cannot be unduly restricted because of their

employment relationship with the firm with whom they deal on behalf of the union.

The decision on the permissible limits of free speech must be judged on a case-by-case basis.

46. One of the most helpful Canadian arbitrator cases in *Re Burns Meats Ltd. and Canadian Food and Allied Workers, Local P139* (1980), 26 L.A.C. (2d) 379 (M. Picher). In that case the company had discharged the grievor because of what it considered false and defamatory statements about two company officers which he printed in a union newsletter in the course of his duties as chief steward of the union. The public statements were made by the grievor in interpreting the company's conduct with respect to a recent arbitration hearing. While the actual statements objected to are not reported, it is clear that he took exception to the company's bona fides in contesting the grievances. In developing a framework of principles against which to review the facts before it, the majority of the board of arbitration canvassed many of the key American cases that have arisen in the context of *The National Labor Relations Act* and adopted the test in that country laid down in *Linn v. United Plant Guard Workers of America, Local 114 et al* (1966), 383 U.S. 53 to the following effect as reported at pages 62 and 63.

We acknowledge that the enactment of s. 8(c) [of the National Labor Relations Act] manifests a congressional intent to encourage free debate on issues dividing labor and management. And, as we stated in another context, cases involving speech are to be considered "against the background of a profound . . . commitment to the principle that debate . . . should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks." *New York Times Co. v. Sullivan*, 376 U.S. 254, 20 (1964). Such considerations likewise weigh heavily here; the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth. But it must be emphasized that malicious libel enjoys no constitutional protection in any context.

This test is accepted and applied by both the NLRB and the courts in related civil matters. The board in *Burns Meats Ltd.* went on to state the approach it thought Canadian boards of arbitration ought to follow in similar terms. At pages 386 and 387 it stated:

While generally a company may be entitled to expect a degree of faithfulness and respect from employees in statements which they make after working hours, it is clear that an employer cannot hold employees to a standard of unquestioning loyalty, especially where union business is concerned. It would be unrealistic not to expect that a union steward will, whether in a speech or a newsletter, occasionally express strong disagreement with the company and its officers, and do so in vivid and unflattering terms. Being at the forward edge of encounters with management, the shop steward becomes particularly vulnerable in the area of discipline. One study has found for example, that one-third of all disciplinary cases involving union stewards are for insubordination: see W. L. Leahy, "Arbitration and Insubordination of Union Stewards", 27

Arb. J. 18 (1972). This is substantially higher than the rate to be found among employees generally: see Adams, *Grievance Arbitration of Discharge Cases*, *supra*, p. 45.

If union stewards are to have the freedom to discharge their responsibilities in an adversarial collective bargaining system, they must not be muzzled into quiet complacency by the threat of discipline at the hands of their employer. In our view the principles developed by the arbitral awards canvassed above and by the Court in the *Linn* case disclose the standard to be applied. The statements of union stewards must be protected, but that protection does *not extend to statements that are malicious in that they are knowingly or recklessly false. The privilege that must be accorded to the statements of union stewards made in the course of their duties is not an absolute licence or an immunity from discipline in all cases.* A steward who openly exhorts employees to participate in an unlawful strike obviously cannot expect that his union office will shield him from discipline for his part in engineering the breach of both a collective agreement and the Labour Relations Act, R.S.O. 1970, c. 232. Similarly, a steward may not use his union office and a union newsletter to recruit and direct employees in a deliberate campaign to harass a member of management: *Re City of London*, *supra*. Conduct so obviously illegal or malicious is outside the bounds of lawful union duty and can have no immunity or protection.

[my emphasis]

Applying this approach to the facts before it, the Board found that the grievor honestly believed what he said to be true although the board in no way endorsed his style or choice of words. The board concluded by writing (at page 389):

While the feelings of Mr. Anderson and Mr. Goetz in response to the newsletter are understandable, and the board in no way endorses the grievor's style and choice of words, the newsletter and the steward's account of the arbitration must be seen for what they are. Any union newsletter is in part a political pamphlet. It cannot be held to the standards of fairness and accuracy of a more disinterested publication. It should come as no surprise to the company that the union's account of the arbitration should be slanted in such a way to bring credit upon itself at the expense of the company and its officers. A thick skin has its place in industrial relations, and those who participate on either side must not be surprised to occasionally find themselves on the receiving end of a stinging verbal blow. Short of malice, such statements must be tolerated. Moreover, the company and its officers in this case were not entirely without recourse. If the company felt that the events had been critically misrepresented by the union it was free to publish and circulate to the employees its own account of what happened and the reason for what its officers said.

47. The statement of principle adopted in *Burns Meats Ltd.* can be traced in the United

States from such early private sector cases as *NLRB v. Electrical Workers* (1953), 33 LRRM 2183 (Jefferson Standard case) to the more recent public sector equivalents such as in *Pickering v. Board of Education* (1967), 391 U.S. 563. See, for example, Lynd, *Employee Speech in the Private and Public Workplace: Two Doctrines or One?* (1977), 1 Indus. Rel. L. J. 711. If a trade union official publicly attacks an employer on non-labour relations issues, he breaches the duty of good faith and fidelity and the *Jefferson Standard* case supports the imposition of discipline or discharge. This is so even when the attack is to achieve a collective bargaining goal. See *Coca-Cola Bottling Works, Inc. and Retail, Wholesale and Department Store Union, AFL-CIO* (1970), 186 NLRB 1050. But if the statements relate to collective bargaining matters and are made without malice, the activity is protected under the *National Labor Relations Act*. It seems clear to us that an approach requiring malice draws its rationale out of a concern for the delicate nature of public comment. As noted in *New York Times Co. v. Sullivan* (1964), 376 U.S. 254 at 279:

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions — and to do so on pain of libel judgments virtually unlimited in amount — leads to a comparable “self-censorship.” Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. See, e.g., *Post Publishing Co. v. Hallam*, 59 F 530, 540 (C.A. 6th Cir. 1893); see also Noel, *Defamation of Public Officers and Candidates*, 49 Col. L. Rev. 875, 892 (1949). Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which “steer far wider of the unlawful zone”. *Speiser v. Randall*, *supra*, 357 U.S. at 526. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

48. It might be questioned why there should be any statutory or arbitral protection for public statements causing an employer rightful concern. It can be argued that public statements “politicize” collective bargaining and are inconsistent with the peaceful resolution of private contractual disputes. By providing protection, some persons may be encouraged to employ such tactics with an adverse affect on industrial peace. Unfortunately, as compelling as this argument may be, collective bargaining can impact the public and vice versa. This is particularly the case in public sector collective bargaining where there is often a clear nexus between public funds and collective bargaining issues. Accordingly, employers as well as trade unions often feel it necessary to speak out and inform the public about collective bargaining issues. Indeed, communication to the public in order to inform and gain support is the essence of picket line activity. And while each situation must be judged on its own peculiar facts, employers can also claim a statutory privilege under section 64 of the *Labour Relations Act* to speak out. See, for example, *The Journal Publishing Company Ottawa Ltd.*, [1977] OLRB Rep. June 309 at 321; and *Canada Cement Lafarge Ltd. v. United Cement, Lime & Gypsum Workers International Union, Local 368* (1980), 80 CLLC ¶16,075 at 14,662 et seq. Labour boards have been reluctant to involve themselves as the censor of public statements made in the context of collective bargaining negotiations on the understanding that such tactics have

come to be part and parcel of that process. See *The Journal Publishing Company Ottawa Ltd.*, *supra*; *Noranda Metal Industries Limited*, [1975] 1 Can. LRBR 145 (BCLRB); *Fruehauf Trailer Company of Canada Limited*, [1975] OLRB Rep. Jan. 77. We further note that in hospital collective bargaining this Board has already acknowledged the role and interest of a third party such as the Ministry of Health in collective bargaining issues. See *St. Joseph's Hospital*, [1976] OLRB Rep. June 255. Against this background, it would be naive and unduly restrictive not to acknowledge the legitimate role of public comment and media interest in the collective bargaining process, although we sense that public posturing is not always a constructive force in resolving labour and management disputes. See *The Corporation of the Borough of North York*, [1968] OLRB Rep. April 66. Undoubtedly, it was this reality of public sector bargaining that discouraged the respondent from objecting before this Board to the complainant writing to the Minister of Health or to holding the press conference in the first place. Indeed, counsel for the respondent made the specific point that the respondent had no objection to the Assessment Committee's report being made public provided that the complainant was accurate in its account of that document. What the respondent did object to, however, was the inaccurate comments of the grievor (and presumably Miss Gribben) relating to the death of Mrs. S.

49. This is the first time a labour relations board in Canada has had to deal with an asserted statutory right of an employed trade union official to speak out. While we have come to the conclusion that the grievor's speech constitutes protected activity, we are not at this time inclined to make a broad statement of principle similar to *Linn v. United Plant Guard Workers of America, Local 114 et al* (1966), 383 U.S. 53 and as adopted in *Burns Meats Ltd.*, *supra*. We can readily appreciate why arbitrators would be attracted to the *Linn* approach in handling discipline cases, but there is justification for a somewhat more incremental approach where affirmative statutory rights are sought to be invoked. More candidly, the difficult facts of this case have discouraged us from seizing upon one general response to these kinds of problems and this time. We might also note that the law of libel and slander in Canada has not had much experience with statements made in a collective bargaining context and still is very much in a state of evolution in this regard. See particularly, Gatley, *The Law of Libel and Slander* (7d ed. London: Sweet & Maxwell Ltd., 1974) at 222-23 (s. 525).

50. We also wish to state that the Board does not endorse the complainant's tactics in this matter. The report of the Assessment Committee was in the nature of a recommendation and yet the complainant's officials conducted themselves as if they had a legal right to have their interpretation of the report fully implemented. If the complainant felt the respondent's response was inadequate, it seems to us that the preferable forum for that concern was the next round of negotiations. But notwithstanding the Board's approval or disapproval of the complainant's tactics, on the facts of this case, we must find that the holding of the press conference was trade union activity within the meaning of the Act and the respondent did not argue otherwise. We are confronted with a public sector collective bargaining relationship and an issue of vital importance to nursing professionals, the community, and hospitals. The conference was preceded by a complaint under a collective agreement culminating in the Assessment Committee's report and the parties were at an impasse over the implementation of that report. Thus, the more particular issue is whether the grievor's public statement constituted proper trade union activity protected by the statute.

51. Again, on the particular facts before us, we have come to the conclusion that she is entitled to seek the protection of the Act. Neither the grievor nor other representatives of the

complainant convened and attended the press conference for the purpose of linking Mrs. S.'s death to the Assessment Committee's report. This is apparent from the fact that Miss Gribben made no mention of the incident in her opening remarks and during the initial round of questions. Also of relevance is the fact that Miss Gribben first mentioned the incident and her version was the most inaccurate. The complainant took no action against Miss Gribben and the grievor became involved only because Miss Gribben first raised the matter with the press. As the local union president, a response from her was almost inevitable. We are further influenced by the fact that the grievor had investigated the incident in a reasonable manner and had drawn the specific allegation to the attention of the respondent well before the press conference. In our view, the respondent's actions did not constitute the kind of response which might have placed the grievor's conduct outside the purview of the Act. Having raised such a serious allegation, the grievor was entitled to a detailed response which would assure a reasonable person in her position that an adequate investigation had been conducted and that the concern of the nurses was unfounded. This clearly did not happen. Finally, we have taken into account that the grievor believed what she said to be true and accurate at the time she made the statement. While the statement was inaccurate and, in this sense misleading, there is also evidence to suggest that the respondent itself had not, at that point, conducted an investigation sufficient to ascertain the true facts. In failing to so act, it deprived the grievor of an opportunity to know exactly what had transpired. The grievor's public statements therefore amount to lawful trade union activities within the meaning of section 3 and are protected by sections 64, 66 and 70 of the Act.

52. This then brings us to an assessment of the respondent's motive. We have no difficulty in understanding why a community hospital in the position the respondent found itself would be concerned about the grievor's public statement. If the statement was inaccurate, the respondent's reputation as a community resource could be irreparably impaired. We have found that the grievor's statement was not only inaccurate but that Mrs. S. clearly received adequate care. The staffing differences between the parties played no role in her death. From this point of view, the alleged concern by the respondent that the grievor's conduct was inconsistent with her status as a nursing professional is a concern not clearly lacking in substance. However, it is of fundamental importance that the respondent did not itself impose a punishment on the grievor but instead invoked legal procedures available to it to cause the College of Nurses to review the grievor's conduct. The College is a statutory agency empowered to respond to such a complaint and entitled to impose sanctions on a nurse where such is appropriate. In our view, the filing of such a complaint could only be viewed as the imposition of a penalty or improper interference under the *Labour Relations Act* if the person filing the complaint did not hold a genuine belief that an offense or violation had been committed and was, instead, intent on forcing the grievor through the hardships of defending against such a charge. The only evidence that might support this conclusion is the respondent's failure to file a similar complaint against Miss Gribben, thereby unfairly singling the grievor out. However, on the basis of Miss Low's testimony, we are satisfied that the respondent simply overlooked complaining against Miss Gribben because she was not the respondent's employee. While the lack of an employment nexus would not prevent such a complaint, we are satisfied that this is why the respondent concentrated its attention on the grievor. On the evidence before us, we are satisfied that Miss Low and the respondent held a genuine belief that Mrs. Mancini's conduct constituted professional misconduct. We are therefore satisfied that the respondent lacked the requisite anti-union animus necessary to support a violation of the Act.

53. This complaint is dismissed.

DECISION OF BOARD MEMBER BROMLEY L. ARMSTRONG;

1. While I agree with the majority's review of the evidence and their finding that the grievor's conduct was lawful union activity protected by the *Labour Relations Act*, I dissent from the majority's decision dismissing the complaint.

2. The respondent submitted that at the press conference on or about June 18, 1980 the grievor improperly linked the staffing arrangement at the hospital with the death of a patient in order to sensationalize the staffing issue and advance the position of the association concerning the staff shortage issue in community ward 5 of the hospital. The respondent further submitted that the grievor's statements were without substance, were made without proper investigation and caused damage to the respondent's reputation as a community resource. The respondent also submitted that it believed the grievor's action constituted professional misconduct and on the basis of this belief, the respondent through Ms. Marion Low, its Director of Nursing, informed the College of Nurses of Ontario of the grievor's statement in order for it to conduct an investigation and possibly impose sanction on the grievor.

3. In my opinion, the only issue before the Board is whether the grievor's statements at the press conference were lawful trade union activities protected by the *Labour Relations Act*.

4. The majority concludes that the grievor is entitled to seek the protection of the Act. Neither the grievor nor other representatives of the complainant convened or attended the press conference for the purpose of linking the patient's death to the Assessment Committee report. Miss Gribben, Chief Executive Officer of the complainant, did not mention the incident in her opening remarks at the press conference or during the initial round of questions. Also relevant is the fact that Miss Gribben and not the grievor first mentioned the incident and Miss Gribben's version was most inaccurate.

5. The respondent took no action against Miss Gribben, who is also a Registered Nurse, but reported the grievor to the College of Nurses for the statements she made at the press conference which the majority have characterized as lawful union activity. An employee engaging in lawful union activity is, in my view, shielded from direct or indirect retribution by an employer for doing so. Therefore, I find the respondent's actions are a violation of section 66(c) and section 70 of the *Labour Relations Act*. The respondent, by reporting the grievor to the College, sought to interfere with her lawful activities as the president of her Local Union and was an attempt to discipline the grievor, albeit indirectly, for the statements made by her at the press conference; statements she made in her capacity as president of the Local which she believed to be true and which were made without malice. In my opinion, the respondent was doing indirectly what it could not do directly, that is, disciplining the grievor for engaging in lawful union activity.

6. I would find that the respondent violated the act and direct appropriate remedies.

2383-81-U Ontario Nurses' Association, Complainant, v. St. Mary's General Hospital, Respondent

Unfair Labour Practice – Hospital having employees sign agreement to work particular shifts – Whether attempt to obtain waiver of rights under interest arbitration award – Whether bargaining directly with individual employees.

BEFORE: G. Gail Brent, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

APPEARANCES: *Shalom Schachter and Jody Stevens for the applicant; Brian R. Gatien, R. Cybulskie, I. Krysz and P. Crowley for the respondent.*

DECISION OF THE BOARD; March 31, 1982

1. This is a complaint brought pursuant to section 89 of the *Labour Relations Act* in which the complainant alleges that the respondent has breached sections 64, 66 and 67 of the Act.

2. Prior to the hearing of evidence on the substance of the complaint, counsel for the respondent raised several preliminary points. The matters raised were that the complaint did not on its face allege anything that was a breach of section 66 of the Act and so the allegation of the breach of that section should be stricken from the complaint; that the complaint made allegations concerning actions taken against unnamed bargaining unit employees and, in the absence of particulars concerning the identity of those people, the complainant should be precluded from adducing evidence concerning any such matters; that the matter of any monetary claims to individuals was purely a dispute involving the interpretation of the interest arbitration award governing working conditions, and a rights arbitration hearing was going to deal with a grievance involving that difference; that the subpoena *duces tecum* served on one of the respondent's administrators was improper in that it was being used as an attempt to force discovery to ascertain whether there was a case rather than as a means of obtaining evidence; and that the relief requested regarding discrimination on the basis of refusal to sign documents be disregarded because there was no allegation of such discrimination set out in the complaint or the particulars furnished to the respondent. The Board heard the representations of both counsel concerning the matters, retired to consider its decision, and rendered an oral ruling. That ruling is hereby confirmed and is set out in the paragraphs which follow immediately.

3. The motion to strike the reference to section 66 is premature. The complaint on its face has set out matters which, if proven, could arguably be a violation of that section. The determination of any such violation should therefore be made on the basis of the evidence and argument presented.

4. The issue of the interpretation of the interest arbitration award governing working conditions is one which is properly put before a board of arbitration, and the difference between the parties concerning their rights and obligations pursuant to that interest award has been submitted to arbitration. The monetary claims of individuals resulting from any alleged violation of that interest arbitration award can be dealt with completely and adequately by the arbitration process. This Board can see no reason why it should not defer to the arbitration

proceedings. Accordingly, no dispute involving monetary claims of individual bargaining unit employees, all of which relate to the interpretation of the interest award governing working conditions, will be considered.

5. The complaint has not alleged that the respondent discriminated or threatened to discriminate against employees on the basis of their willingness or unwillingness to execute any documents. The Board can see no reason then why a remedy should be considered to deal with a wrong which has not been alleged. The Board will therefore hear no representations concerning any remedy which would prohibit the respondent from doing anything where there has been no allegation that the act is being done or threatened.

6. The Board will confine itself to hearing evidence and determining whether the respondent's actions in obtaining the signatures of employees on the documents appended to the complaint as Appendix "D" is a violation of the Act. All representations regarding remedy will be confined to what is appropriate for such alleged violations.

7. In view of the decisions regarding the other preliminary matters, the Board believes that many of the particular objections raised concerning the subpoena have been rendered moot. Accordingly, the Board will make no rulings concerning the subpoena. The Board will only accept admissible evidence which is relevant to the issue properly before it.

8. The parties agreed to proceed on the basis of representative witnesses. Representations concerning onus were reserved to the final argument, and the complainant agreed to present its evidence first, without prejudice to any representations it may make concerning onus. In the consideration of the evidence in this matter, the Board will follow *Silverwood Dairies*, [1981] OLRB Rep. Mar. 321 and apply the reverse onus provision of section 89(5) only to the allegations concerning a violation of section 66. The complainant bears the onus of proving the allegations concerning violations of sections 64 and 67. The respondent bears the onus of proving that there was no violation of section 66 as alleged in the complaint.

9. The dispute revolves around the use of the form which was Appendix "D" to the complaint and which was marked as Exhibit 1 in these proceedings. The form is reproduced below:

APPENDIX D

I AGREE TO WORK ON _____
(name of Unit)

ON _____
(date)

AT MY REGULAR RATE OF PAY.

(signature)

(date)

complete in duplicate
original to payroll
copy — unit files

10. The first witness called by the complainant, Anna Loretto, was a part-time supervisor employed by the respondent. Part of her duties entail calling in nurses to work extra shifts to replace nurses who have called in sick. She testified that she has neither seen nor used the form (Exhibit 1) in the course of her work. She has never required a nurse to sign the form (Exhibit 1) as a condition of working or for any other purposes.

11. The parties agreed that an interest arbitration award (hereinafter referred to as the O'Shea award) set out the terms and conditions of employment as of October 23, 1981. The parties are awaiting an interest arbitration award dealing with local issues. Prior to October 23, 1981, the parties had executed an agreement to alter working conditions during the freeze period. That agreement had attached to it a commitment form to be executed by nurses classified as regular part-time. In the commitment form, the regular part-time nurse promised, among other things, to work a minimum of thirty-seven and one-half (37-1/2) hours during a two-week period. It was accepted by the parties that a regular part-time nurse could refuse to work hours beyond the minimum commitment, and that a casual nurse could refuse to work whenever called. Prior to October 23, 1981, the rate of pay would depend on the terms of the agreement between the parties. After October 23, 1981, the rate of pay would depend on the terms of the O'Shea award.

12. The second witness for the complainant was Debbi Cecconi, who was at all material times a regular part-time nurse employed by the respondent in its Emergency Department. In February 1981 she also became Executive Secretary of the complainant's local. She was asked to sign the form in question during the week of October 25, 1981 (after the O'Shea award) and did sign it. To her knowledge four other regular part-time nurses also signed the form at the same time.

13. At the time that these forms were executed the work schedules for the Emergency Department had been posted for the period November 15, 1981 to February 6, 1982 inclusive. All of the nurses in question had already been pre-scheduled to work certain hours. All of the forms signed by those nurses were essentially the same as that signed by Ms. Cecconi, to wit:

I agree to work in Emergency for the scheduled shifts between November 15th, 1981 and February 6th, 1982 at my regular rate of pay.

The previous blank portions of the form were filled in by hand by Annette Schiratti, the supervisor of the department.

14. Ms. Cecconi had never been asked to sign such a form before, and has never been asked to sign such a form since then. During the two-week period from December 13, 1981 to December 26, 1981, she was pre-scheduled to work more than thirty-seven and one-half (37-1/2) hours; she agreed that a regular part-time nurse can agree to be scheduled for more than that number of hours. She was fully aware of the number of hours she had been scheduled to work when she signed the form.

15. Mr. Frank Empey also testified for the complainant. At all material times he was employed as a full-time registered nurse in the respondent's Emergency Department. After considering his evidence and that of Ms. Schiratti, his supervisor, the Board finds that on January 5, 1982, Mr. Empey signed the following agreement:

I agree to work in Emergency on Jan. 7/82 at my regular rate of pay.

At the time the form was executed Mr. Empey was scheduled to work fewer than seventy-five (75) hours in the appropriate two-week period. He wanted to work the shift which became available for January 7, 1982 to make up his full seventy-five (75) hours. The above form was the only one which Mr. Empey ever signed.

16. Ms. Schiratti also testified. She confirmed that Mr. Empey was the only full-time nurse whom she had sign the form, and that she used the form for regular part-time nurses whom she scheduled for more hours than the minimum commitment.

17. In Mr. Empey's case, Ms. Schiratti said that she knew that she had to replace a nurse on a shift, and that Mr. Empey said that he would work the shift because he was short his full complement of hours due to having taken three statutory holidays in the period. She said that she told him that he could have the shift at straight time and had him sign the form. Ms. Schiratti said that she could have called in a casual nurse at straight time to do the work and wanted to have the work done at straight time. She also said that she believed the form to be unnecessary because Mr. Empey would not have worked more than seventy-five (75) hours in any event.

18. Ms. Schiratti said that she never used the form to cover any shifts for regular part-time nurses which were not pre-scheduled. She said that she did not know who drew up the form or why the line "at my regular rate of pay" was put on the form. She said that she was not familiar with any form used for nurses to agree to waive the premium rate for call-in.

19. It was agreed that all nurses (full-time, part-time and casual) are members of the bargaining unit.

20. The respondent's position is that any dispute between the parties concerning the manner in which the employees were paid rests solely on the interpretation of the O'Shea award. The respondent does not rely on any of the forms signed as giving rise to a waiver of any employee's rights under the O'Shea award, nor does it intend to rely on the forms to support an estoppel argument concerning any rights granted in the O'Shea award. That being the case, the only use which we can see the forms having, at least in the cases of the regular part-time nurses, is to confirm their agreement to work their scheduled hours which exceeds the minimum commitment. In Mr. Empey's case, the form is not being relied on as the basis upon which his pay was calculated and, in light of the respondent's position, would appear to have no effect whatsoever.

21. The complainant asserted that the essence of its complaint was that the respondent did not restrict itself to bargaining with the complainant bargaining agent, but has dealt directly with the employees. In support of its position, it cited *Windsor Airline Limousine Services Limited*, [1980] OLRB Rep. July 1147. In that case the employer attempted to justify a change in working conditions during the freeze period by relying on a vote it took among the employees. The Board pointed out, in paragraph 20, that such a vote could not affect the decision concerning the freeze period and "may be viewed as an attempt to circumvent the certified bargaining agent whose consent is required for any change in terms or conditions of employment".

22. In this case there is no evidence to show that any working condition or term of employment, as set out in the O'Shea award, was altered or affected by the forms signed by the

employees. If nothing changes as the result of the execution of a document, can it be called evidence of a bargain or an attempt to bargain in any sense of the word? The respondent's position is that the forms signed by the employees did not affect the way in which it calculated their pay under the O'Shea award, and the hospital's interpretation of the employees' rights was made independent of the forms.

23. There is no evidence to suggest that the respondent ever refused to recognize the complainant as the bargaining agent for the employees in the bargaining unit.

24. There is no evidence to suggest that the respondent ever attempted to interfere with its employees' rights to be represented by the bargaining agent of their choice or to exercise any other rights under this Act, or that it discriminated against any employee by virtue of membership in the complainant.

25. The Act does not preclude an employer from dealing directly with an employee to ensure that he/she understands what his or her schedule is and how the employer views its obligation to pay for those scheduled hours. The dissemination of such information is not bargaining. The forms in question may, on their face, possibly be interpreted as an attempt to have employees waive their rights under the O'Shea award; however, in the light of all the evidence heard, it is not possible to support such a view as the purpose for which they were intended or used. As a consequence, we cannot conclude that the respondent ever circumvented the complainant and struck any bargains directly with the employees.

26. In conclusion, for all of the reasons set out above, the Board concludes that there was no violation of sections 64, 66 or 67, and the complaint is dismissed.

2270-81-M; 2271-81-M The Board of Education for the City of Toronto, Employer, v. International Brotherhood of Electrical Workers, Local 353, Trade Union; The Board of Education for the City of Toronto, Employer, v. Toronto-Central Ontario Building and Construction Trades Council, Council

Conciliation Officer – Whether minister has authority to appoint conciliation officer – Council of Trade Unions bargaining on behalf of member trade unions – Whether bargaining rights transferred to council or council merely acting as agent – Whether local union can withdraw from council and give notice to bargain individually – Whether local union having to obtain bargaining rights afresh

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. Kobryn and F. W. Murray.

APPEARANCES: *L. C. Arnold and William Hardy for the trade union; R. J. Drmaj and B. E. Goddard for the employer; Alexander J. Ahee and James “Dave” Johnson for the Council.*

DECISION OF THE BOARD; March 22, 1982

1. The Minister has referred to the Board, pursuant to section 107 of the Act, questions as to whether he has the authority under section 16 of the *Labour Relations Act* to appoint a conciliation officer in either or both of these references.
2. In Board File No. 2270-81-M, the Minister has characterized the question as whether or not the trade union (“Local 353”) is the lawful bargaining agent for the unit of employees which is the subject of this request. In Board File No. 2271-81-M, the Minister has characterized the question as whether or not the Council is presently authorized to act as the exclusive agent for Local 353 for the purpose of bargaining collectively with the employer.
3. On the agreement of the employer, Local 353 and the Council these references were heard together.
4. The evidence before the Board was in the form of agreed facts. Local 353 is a member of the Council. On May 4, 1965, the Board issued a certificate to Local 353 with respect to a bargaining unit of “all journeymen electricians in the employ of [the employer], save and except foremen and persons above the rank of foreman”. Local 353 and other trade unions represented by the Council have permitted the Council to bargain on their behalf with the employer since 1965 or 1966. The first collective agreement between the Council and the employer was effective on January 1, 1966. Local 353 has never signed a separate collective agreement with the employer as an individual trade union. The most recent collective agreement between the Council and the employer was made on September 11, 1980, and by its terms came into effect on January 1, 1980, until December 31, 1981.
5. The Council is a council of trade unions as envisaged under section 1(1)(g) of the Act and is not a certified council of trade unions within the meaning of section 1(1)(d) of the Act. Local 353 was initially under the impression that the Council could have been a certified council of trade unions. Local 353 received a petition from the employees of the employer that it claims to represent which indicated a desire to bargain separately and decided to call a

meeting of these employees. Local 343 caused the following handwritten notice to be handed to these employees with their paycheques. The notice stated as follows:

Sept. 23/81

Dear Sir & Bro

Please be advised that a meeting is to be held of all the electrical employees of the Board of Education to discuss and vote on a proposal to withdraw from the Building Trades Council bargaining unit and to bargain through Local Union 353.

The meeting is to be held at Brockton J.S., Bloor and Dufferin on Wednesday, Sept., 30th at 5:00 P.M.

Yours fraternally

"W. G. Hardy"
Bus., Mgr.

Neither the employer nor the Council were aware that this meeting had been arranged and held. At this point Local 353 did not intend to withdraw from the Council as a member of the Council. Local 353 wished only to withdraw from the Council bargaining unit. The meeting was held and the employees voted thirty-seven to one in favour of bargaining separately. There are about one hundred and twenty electricians who are employed by the employer.

6. On October 1, 1981, Local 353 hand delivered to the employer and to the Council the following letter:

In accordance with the Labour relation Act, 1981, Section 55(1), we are hereby advising that at a special called meeting on Wednesday, September 30, 1981, of the electrical employees of the Board of Education for the City of Toronto, the said employees voted in favour of withdrawing from the Toronto-Central Ontario Building and Construction Trades Council bargaining unit at the Board. Thus Local Union 353, International Brotherhood of Electrical Workers, who have been previously certified at the Board, intend to bargain on their own behalf directly with the Board to amend the current agreement which expires December 31, 1981.

In addition, and on the same date, the same letter was sent by mail to the trade unions which are set forth in the most recent collective agreement under the heading "Member Unions of the Council are:". The trade unions are as follows:

- | | |
|---------------|--|
| Local No. 95 | — International Association of Heat and Frost Insulators and Asbestos Workers. |
| Local No. 128 | — International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers. |

Local No. 2	— International Union of Bricklayers' and Allied Craftsmen.
Carpenters Council	— Carpenters' District Council of Toronto and Vicinity.
Local No. 353	— International Brotherhood of Electrical Workers.
Local No. 721	— International Association of Bridge, Structural and Ornamental Iron Workers.
Local No. 31	— Marble Masons, Tilesetters and Terrazzo Mechanics.
District Council No. 46	— International Brotherhood of Painters and Allied Trades.
Local No. 506	— Labourers' International Union of North America.
Local No. 46	— The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada.
Local No. 2965	— The Resilient Floor Workers United Brotherhood of Carpenters and Joiners of America.
Local No. 30	— Sheet Metal Workers' International Association.
Local No. 598	— Operative Plasterers and Cement Masons national Association of the United States and Canada.

On October 1, 1981, Local 353 was acting on the assumption (subsequently viewed as mistaken) that the Council was a certified council of trade unions.

7. In a letter dated October 23, 1981, Local 353 sent the following letter to the employer:

Further to our correspondence of October 1, 1981, and in accordance with Article 29, section 29:01 of the agreement currently in effect between the Board of Education for the City of Toronto and the Toronto-Central Ontario Building and Construction Trades Council, we are hereby advising that it is the desire of Local Union 353 I.B.E.W., to meet with the Board of Education with the view of negotiating revisions to the aforementioned agreement.

In a letter dated December 3, 1981, the employer replied to Local 353 as follows:

Your correspondence dated October 1, 1981 and October 23, 1981 has been received.

Please be advised that the Toronto Board of Education wishes to continue with the present arrangement for dealing with members of the Toronto-Central Ontario Building and Construction Trades Council, including Local 353 of the International Brotherhood of Electrical Workers, in respect to collective bargaining and administering the agreement.

The Toronto-Central Ontario Building and Construction Trades Council has advised the Board that they wish to negotiate revisions to the existing agreement between the Board and the Council and I anticipate that such negotiations will commence in the very near future. As a member of the Council I assume that you will participate in their negotiations.

In a letter dated December 7, 1981, Local 353 responded to the employer as follows:

We received your correspondence dated December 3rd, 1981 signed by Mr. B. E. Goddard and wish to advise that Local Union 353 made its position clear in our correspondence of October 1st, 1981 and we are not interested in changing that position.

It is our understanding that we have complied with the requirements of the Labour Relations Act enabling Local Union 353 to withdraw from the Building Trades Council bargaining unit and as the local union has been certified at the Board we fail to see how the Board can legally or morally refuse to bargain with us.

With the foregoing in mind we respectfully request that you give serious and immediate consideration to contacting this office to make arrangements for a meeting to initiate negotiations.

8. On December 7, 1981, Local 353 consulted its solicitors and on December 8, 1981, the solicitors wrote the following letter to the employer:

Please be advised that we have been retained on behalf of the International Brotherhood of Electrical Workers Local 353, (Local 353), in connection with the above matter.

We are advised that by letter of October 1st, 1981, Local 353 informed you that as a result of a Resolution dated September 30th, 1981, Local 353 was no longer to be represented in Collective Bargaining with the Board of Education by the Toronto-Central Ontario Building and Construction Trades Council (The Council), by reason that it had withdrawn from the Council Bargaining Unit and would be bargaining with you on its own behalf.

Notice to Bargain was given to you by letter of October 23, 1981, and it appears that you have chosen to ignore Local 353's request to bargain, as evidenced by your letter of December 3, 1981. The position of Local 353 was confirmed to you in their letter of December 7, 1981.

Although the Notice given to you, and to all other required parties, was that envisaged by Section 55(1) of the Act, and was premised on the understanding that the Council was a certified council, such notice was equally effective to give to you the Notice envisaged by Section 51(5) of the Act.

For greater certainty, however, we hereby give notice to you on behalf of the International Brotherhood of Electrical Workers, Local 353, that the said Local 353 will not be bound by any Collective Agreement entered into between the Board of Education and the Toronto-Central Ontario Building and Construction Trades Council.

Please acknowledge to us, or directly to Local 353, that it is your intention to bargain with Local 353 as requested in the Union's letter to you of October 23, 1981. If this acknowledgment is not received by December 15, 1981, we are instructed to take appropriate action to enforce bargaining.

9. On December 16, 1981, Local 353 made a request for the appointment of a conciliation officer and on January 12, 1982, the Council made a similar request.

10. Local 353 pointed out that it had received the certificate from the Board and that the Council was a council of trade unions within the meaning of section 1(1)(g). Local 353 stated that it had appointed the Council to be its agent for the purpose of collective bargaining and that by its letters dated October 1 and December 8, 1981, it had given notice of its intention to bargain directly with the employer to amend the current collective agreement. Local 353 adopted the position that before any new collective agreement was entered into it had advised the employer that it would not be bound by any collective agreement entered into between the employer and the Council and that this notice was notice under section 51(5) of the Act.

11. It was argued by Local 353 that, although it had never exercised its bargaining rights in an individual manner, the bargaining rights reverted automatically to it and that the letter dated October 23, 1981, was the exercise of a right to give notice to bargain. Local 353 characterized the letter dated December 8, 1981, as notice to bargain under the collective agreement and also under section 53 of the Act. Local 353 stressed that if the Council were a certified council of trade unions and not a council of trade union within the meaning of section 1(1)(g) then the withdrawal accomplishes the same objective. Local 353 reasoned that under section 55(1) notices of the resolution have the effect of withdrawing from the Council's bargaining unit ninety days after notice was given.

12. Local 353 made reference to the constitution of the Council and referred to Article 3 which sets forth the objects of the Council and argued that it was invoking the sections of the Act only to the extent that bargaining rights are affected. Local 353 relied on a decision of the Board in *The Labour Bureau of The Ontario Road Builders Association and of The Ontario*

Sewer and Watermain Contractors Association, [1979] OLRB Rep. Aug. p.789, in support of its argument that the Minister has the authority to appoint a conciliation officer. Local 353 referred to Articles 1.01(c), 2.01(a), (b) and (d) of the collective agreement and to section 51(5) and argued that the Act governs. Local 353 also referred to Articles 2.02, 7.01, 11.01 and 26 of the collective agreement. Local 353 did not oppose the request of the Council for the appointment of a conciliation officer for the trade unions it represents in collective bargaining.

13. The employer posed the question of whether Local 353 could withdraw from participating in negotiations and the collective agreement. As secondary questions, the employer stated that even if Local 353 could withdraw, it had not pursued the proper path under the Act and the collective agreement. The employer argued that sections 55(1) and (2) does not apply because the Council is not a certified council of trade unions. The employer further argued that section 51(4) is applicable and that the collective agreement was binding on the Council at the time Local 353 made its request to withdraw from group negotiation.

14. The employer referred to Article 2.01(b) of the collective agreement and argued that there had been a delegation to the Council of the rights of Local 353 and the Local 353 had agreed not to seek to bargain individually with the employer. It was the position of the employer that Local 353 did not advise it under Article 2.01(b) and would therefore have to wait for the collective agreement to expire and could not request separate bargaining during the term of the collective agreement. The employer further argued that under Article 2.01(d), Local 353 would cease to be a member of the Council and would have to acquire bargaining rights.

15. In the alternative, the employer argued that nothing flowed from the certificate of the Board dated May 4, 1965, because Local 353 had never conducted individual negotiations with the employer. The employer reasoned that under these circumstances, Local 353 had abandoned its rights under the collective agreement and had acquiesced and delegated to the Council the right to bargain with the employer. The employer argued that even if Local 353 could withdraw, it would go into limbo being no longer covered by a collective agreement and no longer in a position to bargain collectively. The employer pointed out that the Council participates in step four of the grievance procedure, that in Article 3.01 the bargaining unit was defined as "all tradesmen" and that the collective agreement was not signed by the trade unions.

16. The Council, in opposing the request of Local 353 for the appointment of a conciliation officer, adopted the argument of the employer. The Council remarked that it had never been given any notice of the meeting called by Local 353, had not been given an opportunity to address the issue and that the desire by Local 353 to bargain separately had not been raised at meetings of the Council. In addition, the Council expressed concern that Local 353 might be in the position to attend its meetings and be privy to its bargaining strategy and at the same time be bargaining separately with the employer.

17. In reply, Local 353 argued that the argument with respect to section 51(4) was purely technical and that section 53(1) overrides the collective agreement in providing that notice in writing could be given. Local 353 stated that if the Board found that there is a defect it would be perfectly simple to serve notice once more on the employer. Local 353 argued that it had never transferred any bargaining rights to the Council and had merely appointed the Council to act as an agent for it in collective bargaining.

18. The preamble and various articles of the collective agreement previously referred to state as follows:

PREAMBLE

WHEREAS the Board and the Unions, as hereinafter set out, wish to make a common Collective Agreement with respect to employees of the Board's Maintenance and Construction Department engaged in maintenance and construction work for the Board and to provide for and ensure uniform interpretation and application in the administration of that Agreement.

AND WHEREAS in order to ensure relativity and uniform interpretation and application, the Unions wish to negotiate and administer the same Collective Agreement in concert through a Council and for the purpose wish to maintain the Council and empower it to act as the exclusive agent of each Union.

AND WHEREAS the Board recognizes the formation by the Unions of a Council and wishes to deal with the Council as the exclusive agent of the Unions in negotiating and administering a common Collective Agreement.

ARTICLE 1 — DEFINITIONS

1.01 In this Agreement:

• • •

(c) "Union" means the Member Union of the Council.

ARTICLE 2 — THE COUNCIL

2.01 The Unions hereby agree each with all the others and with the Board:

(a) To maintain the Council, composed of those Unions comprising the Council and no others, as their sole representative and exclusive agent for the purpose of bargaining collectively with the Board, and administering this Agreement, and

(b) To delegate, and the Unions do hereby delegate to the Council acting as their sole representative and exclusive agent, all their rights as bargaining agent for members of their respective Unions who come within the scope of this Agreement, and not to seek to bargain individually with the Board, and

• • •

(d) That should a member Union of the Council cease to be a member of

the Council for any reason, all the rights and privileges of such Union under this Agreement shall be nullified and the Board shall not be required to bargain collectively with such Union unless certification procedures required by law have been made.

• • •

2.02 The Council, acting as the sole representative and exclusive agent of the Unions, accepts the delegation of rights as set out in Clause 2.01(b) of this Article 2 and assumes the responsibility of bargaining collectively with the Board on behalf of all employees of the Board who come within the scope of this Agreement.

ARTICLE 7 — UNION SECURITY

7.01 All employees under this Agreement, as a condition of employment, shall be members of the appropriate Union, and maintain such membership in good standing.

ARTICLE 11 — GRIEVANCE PROCEDURE

11.01 It is agreed that it is the spirit and intent of this Agreement to adjust employee or employer grievances promptly.

Should a dispute arise between the Board and any employee or the Union regarding the interpretation, meaning, operation or application of this Agreement, including any question as to whether a matter is arbitrable, or where an allegation is made that this Agreement has been violated, or should any other dispute arise, an earnest effort shall be made to settle the dispute in the manner outlined in this Article but any deviation from this procedure shall result in the forfeiture of all rights under the Article.

Disputes shall be dealt with so far as possible by discussion between the individuals directly affected. If a satisfactory solution of a dispute cannot be reached at this level, the dispute shall become a grievance and such grievance shall be processed in order to reach a fair and amicable settlement in accordance with the terms of this Article. Disputes of a general nature between the Board and the Union may be initiated by the appropriate representatives at Step 3.

Where a dispute involving a question of an employee's medical assessment occurs, the Board and the Council may agree to by-pass steps 1 and 2 of the Grievance Procedure.

Step 1

The grieved employee shall refer his grievance to the Steward. The Steward and the appropriate Foreman shall meet to discuss the grievance within five (5) working days of the act causing the grievance. If a settle-

ment of the grievance is not reached within five (5) days the Steward shall refer the matter to the Business Agent of the Union affected and the Foreman shall refer the matter to the appropriate Board Supervisor.

Step 2

If either the Business Agent of the Union or the Board Supervisor considers the grievance to be justified, they shall first seek to settle the dispute.

The grievance will be processed formally after this step. It will be in writing and it will be formally "signed off" if the matter is settled or referred to the next step if not resolved.

Step 3

Failing satisfactory settlement within five (5) working days after the dispute is submitted under Step 2, the Business Manager of the Council or the Business Agent of the Union shall, within seven (7) working days, refer the grievance in writing to the Appropriate Official of the Board.

The Superintendent of Maintenance and Construction, or his Deputy, will review the submission, hold a meeting with the Business Agent of the Union and the Board Supervisor and within five (5) working days after receipt of such submission, render his decision.

Step 4

Failing satisfactory settlement within five (5) working days after the dispute is submitted under Step 3, the Manager of the Council shall, within seven (7) working days, name three representatives to meet with three senior officials of the Board. The Committee will be comprised of persons who have not been involved in any of the preceding steps of the grievance procedure pertaining to the grievance in question. The Committee shall meet within fourteen (14) working days of its appointment, or such longer period as may be mutually agreed upon by the Committee members, to consider the grievance referred to it. This Committee so appointed shall endeavour to reach a mutually satisfactory settlement. A unanimous decision of the Committee shall be final and binding on both parties.

Step 5

Failing satisfactory settlement within five (5) working days after the dispute is discussed by the Joint Committee as appointed in Step 4, the grievance may be referred by the Council to arbitration at any time within twenty-one (21) working days thereafter, but not later.

ARTICLE 26 — UNION REPRESENTATIVES

26.01 To enable official recognition of Stewards, Union representatives shall inform the Assistant Superintendent, Personnel of the Board in writing of the names of all Stewards as they are appointed and when they cease to act as Stewards.

26.02 The steward shall be given reasonable time during working hours to fulfill his duties and obligations in accordance with the collective agreement.

26.03 The shop steward shall be advised of new employees in his trade and when employees are laid off the shop steward shall be notified prior to the layoff.

26.04 Representatives of the Union shall have access to the area of work during working hours but in no case shall their visits interfere with the progress of the work.

26.05 If an employee is subject to disciplinary action by his superiors, he shall be allowed to have with him a Union representative if he desires.

Section 3 of the constitution of the Council states:

ARTICLE 3

objects

The objects of this Council are:

3.01 To enlist the co-operation and support of every affiliated local union in order to establish and maintain adequate wages and working conditions in the Building and Construction Industry.

3.02 To promote the growth and development of all Building and Construction Trade Unions through a co-ordinated programme of organization of all Building and Construction workers in the area along traditional trade or craft lines.

3.03 To establish and maintain legal and proper business relations and agreements between this Council and other responsible parties, either individuals or associations or government agencies to the extent that the best interests of the Building and Construction Industry be served both for employers and employees.

3.04 To engage in legislative activity for the promotion and protection of the interests of Building and Construction trades [sic] unions and their members, and to protect and advance the interests of the Building & Construction Trades Industry.

19. The preamble to the collective agreement makes it clear that the unions wish to negotiate and administer the same collective agreement through a council and that for that purpose wish to maintain the Council and empower it to act as the exclusive agent for each union. The Board notes that the language speaks in terms of appointing or making the Council the exclusive agent for each union. There is nothing either in the preamble or in the rest of the collective agreement whereby the Council purports to act as the exclusive bargaining agent for the employees who are covered by the collective agreement. The collective agreement contains one bargaining unit as set out in Article 3.01 and in Article 1.01(d), employee is defined as any person in the bargaining unit defined in Article 3. Article 2.01(b) states that the unions agree each with the other and with the employer to delegate to the Council acting as their sole representative and exclusive agent all their rights as bargaining agent for members of their respective unions who come within the scope of the collective agreement, and further agree not to seek to bargain individually with the board. Article 2.01(d) states that should a union of the Council cease to be a member of the Council for any reason, all of the rights and privileges of such union under this agreement shall be nullified and the employer shall not be required to bargain collectively with such union unless certification procedures required by law have been made. If the Council is merely the agent for Local 353 and for the other trade unions who are covered by the collective agreement, then the parties are not competent to enact private legislation which would have the effect of taking away the bargaining rights which Local 353 obtained in 1965. On the other hand, if the Council has become the bargaining agent of Local 353 and the other trade unions, then it would be necessary for Local 353 to apply for certification or obtain voluntary recognition with respect to the employer. In this regard, the Board notes that there was nothing before it which suggested that there had been a transfer of jurisdiction as contemplated by section 62 of the Act. In Article 11, which deals with the grievance procedure, it is quite clear that the trade unions who are members of affiliates of the Council play a major role, initially endeavouring to resolve grievances under the collective agreement. For example, provision is made for the appointment of stewards and it appears that the stewards are drawn from the respective trades which are covered by the collective agreement. At steps three and four of the grievance procedure, the manager of the Council plays an increasing role in endeavouring to settle grievances.

20. There are some points of similarity between the instant case and the circumstances referred to in *The Labour Bureau of The Ontario Road Builders Association and of The Ontario Sewer and Watermain Contractors Association, Supra*. In the latter case, the form structure of the collective agreement was more clearly to the intent that the constituent trade unions retained their own bargaining rights. In the instant case, the collective agreement has been executed by the business manager and secretary of the Council. While the form of the collective agreement in the instant reference would lead the Board to conclude that in fact the Council is the bargaining agent for the bargaining unit of employees contained in Article 3, the preamble to the collective agreement makes it clear that the Council is merely appointed as the agent of the trade unions, including Local 353, and the Board is unable to conclude that there was any transfer of jurisdiction by Local 353 to the Council.

21. It was agreed that the Council is not a certified council of trade unions as defined in section 1(1)(d). The Act contemplates that the role of an uncertified council of trade unions is to act as an agent of the trade unions which it represents rather than as an independent participant and bargaining agent. The decision of the Board in *Bathe & McLellan Const. Ltd.*, [1969] OLRB Rep. Jan. p.1041, held that "trade union" does not include an uncertified council of trade unions. It follows that the Council may neither hold nor exercise bargaining rights in

its own name. However, the Council may act as an agent of other trade unions which possess bargaining rights. In the instant reference, the Council is in law acting as an agent for, *inter alia*, Local 353 and any attempts to clothe the Council in the collective agreement or elsewhere with the appearances of a bargaining agent on its own name are without an legal effect.

22. Local 353 has given timely notice to bargain to the employer in accordance with section 53(1) of the Act, and also in accordance with the terms of the collective agreement if the letters dated October 1 and October 23, 1981 are to be regarded as notice pursuant to the collective agreement. In the view of the Board, the notice contained in those letters is notice under the terms of the collective agreement. Local 353 has given notice as contemplated by section 51(4) of the Act, and has disclosed to the employer, pursuant to section 51(5) of the Act, that it will not be bound by a collective agreement between the Council and the employer.

23. There is nothing in the Council's constitution or in the Act which requires Local 353 to give notice to the Council of the meeting which was held on September 30, 1981, or to permit the Council an opportunity to address the issue before that meeting. The concerns of the Council with respect to bargaining strategy will have to be resolved under the constitution of the Council. Local 353 has withdrawn from bargaining through the Council and the reference in section 51(4) of ceasing to be a member of or affiliated with the Council is to be interpreted as applying to such a state of affairs in so far as it affects collective bargaining. Such an interpretation is consistent with instances where an uncertified council of trade unions exists solely for the purpose of acting as an agent in collective bargaining. In the instant references, the Council, as set forth in Article 3 of its constitution, performs, other functions. It is not necessary that Local 353 withdraw from the Council in order to exercise its bargaining rights in its own name under the Act. Local 353 has exercised its bargaining rights through the Council and there is nothing to support the argument that Local 353 has abandoned its bargaining rights or that Local 353 is required to obtain bargaining rights through certification or voluntary recognition. Local 353 has served notice on the employer as required under the Act.

24. While the Board shares the concern of the Council and the employer that the bargaining conditions may be made more difficult by the withdrawal of Local 353 from the Council, in the view of the Board, Local 353 may pursue its own bargaining with the employer in the exercise of the bargaining rights which it has heretofore exercised through the Council acting as its exclusive agent. There is no requirement that Local 353 either obtain bargaining rights again or that the Board initially declare that the Council no longer possesses the right to bargain as the exclusive agent of Local 353 before Local 353 may exercise its rights under the Act.

25. Having regard to the foregoing, the Board's answer to the Minister is that the Minister has the authority to appoint a conciliation officer in each of these references, and that with regard to the reference concerning the Council, the conciliation officer may be appointed with reference to bargaining between the employer and the Council representing the trade unions that it has heretofore represented with the exception of Local 353.

DECISION OF BOARD MEMBER H. KOBRYN;

1. While I agree with the result, I wish to express the following additional reasons in this case which stems basically from my background as a former business manager of a construction local union for sixteen years and an active participant of the Building and

Construction Trades Councils both at the local and provincial level since 1953. This participation was as a delegate and an officer, right up to the time I became a member of the Ontario Labour Relations Board.

2. I supported the purpose and the principles for which building and construction trades councils were organized. The purpose was to have an organization where local unions of the various construction trades could band together. The principles were to give each other mutual support and backing and our motto was "In Unity there is Strength".

3. This application to the Board by one local union to go it alone and this resulting Board decision flies in the face of the above-stated purpose and principles.

4. Legally, I cannot disagree with the majority in this decision because the *Ontario Labour Relations Act* permits Local 353 of the I.B.E.W. to withdraw from the bargaining unit of this Council, in its negotiations for a renewal of the present collective agreement — a collective agreement that has been renegotiated between the Council and the Toronto Board of Education since its first signing in 1967 on behalf of all its participating affiliates.

5. Morally, there is no possible way in which I can agree with this decision because it goes against the very principles that I hold so dear and actively supported for the past many years. I sincerely hope that this Local union and its members will reconsider their decision to go it alone and preserve this bargaining unit of long-standing and the unity of this Council.

2331-81-R Arthur Wilkinson, Applicant, v. United Food & Commercial Workers Local 633, AFL. CIO. CLC., Respondent, v. Vauclair Meats Limited, Intervener

Bargaining Unit – Petition – Termination – Employees terminated by predecessor – Having right of first refusal for vacancies with successor employer – Never having worked for successor – Whether deemed to be bargaining unit employees for purpose of termination vote – Whether Board departing from 30 day rule – Whether employer involved in origination of petition

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members B. L. Armstrong and J. A. Ronson.

APPEARANCES: *A. Wilkinson for the applicant; B. W. Adams and J. Dinardo for the respondent; A. Hallam, W. R. Herridge and S. Stephenson for the intervener.*

DECISION OF THE BOARD; March 19, 1982

1. This is an application for termination of the respondent union's bargaining rights. At the hearing, the union withdrew its objections to the timeliness of the application. The sole issue argued before the Board is whether the evidence demonstrates that not less than forty-five per cent of the intervener's employees have *voluntarily* signified in writing that they no longer wish to be represented by the respondent union. This, in turn, requires the Board to

determine the number of employees in the bargaining unit, and to decide whether the employee petition filed in support of this application is voluntary. We will deal with each issue in turn.

2. Vaunclair Meats Limited, the intervening employer in the instant case, is the successor of a much larger business entity known as Vaunclair Purveyors Limited. When it was in full operation, Vaunclair Purveyors employed as many as 150 employees. Those employees were represented by the respondent union. Vaunclair Purveyors ran into financial difficulties in 1980, and by the time it closed down on or about September 30, 1980, its employee complement was reduced to about 70.

3. Vaunclair Meats was established shortly after the demise of Vaunclair Purveyors, by some of the principals of the latter company. This prompted the trade union to file an application under section 55 (now section 63) of the Act asserting that Vaunclair Meats had acquired "part of the business" of Vaunclair Purveyors, and that consequently, the union retained bargaining rights for the employees of Vaunclair Meats, and Vaunclair Meats was bound by the collective agreement which formerly bound Vaunclair Purveyors. The union also served Vaunclair Meats with a notice of its desire to bargain for a new collective agreement and a grievance alleging that Vaunclair Meats had not complied with the seniority provisions in the collective agreement it inherited from its predecessor. Vaunclair Meats denied that it was the successor of Vaunclair Purveyors.

4. The union's successor rights application was filed on November 12, 1980. Notices of that application were posted on the employer's premises. In response, Arthur Wilkinson, a former employee of Vaunclair Purveyors who was now an employee of Vaunclair Meats, intervened in the successor rights application. On November 20, 1980, he filed a separate application for termination of the union's bargaining rights. Since this termination application would be academic if there were no bargaining rights to terminate, the Board set it aside until the successor rights issue was resolved. Mr. Wilkinson remained an intervener in that matter.

5. By a decision dated May 4, 1981, (reported at [1981] OLRB Rep. May 500) the Board held that Vaunclair Meats had acquired "part" of the business of Vaunclair Purveyors, and accordingly, it remained bound by its predecessor's collective bargaining obligations. With that issue resolved, Mr. Wilkinson's application was brought on again; but by a decision dated August 5, 1981, (reported at [1981] OLRB Rep. Aug. 1186) the Board held that it was untimely. On that basis, it was dismissed.

6. With the conclusion of these proceedings before the Board, there remained outstanding the union's grievance, and its notice to bargain for a new agreement. The union and Vaunclair Meats were able to reach an amicable resolution of both. Ultimately, a collective agreement was signed which contained, inter alia, the following clause (actually a "letter of understanding" jointly signed by the parties):

"The Union confirms that the Seniority List for Vaunclair Meats Limited is as set forth in Schedule C to the Collective Agreement dated January 14, 1982. Also that there are no outstanding grievances or claims by the Union or any employee relating to seniority.

With respect to the Seniority List Schedule C to the Collective Agreement it is agreed that Latronico and Anastassiou shall, for a period of one year from today's date, be offered employment when the employer has job openings in their job classifications, and if so hired, each shall have seniority as shown on Schedule C. Latronico and Anastassiou shall not however be entitled to bump any existing employee. Since Arrangio is a temporary employee, the employer shall be entitled to terminate her at any time.

The Union further confirms that, as of today's date, there are no outstanding grievances or claims of any kind by the Union or any employee with respect to any collective agreement which may be binding upon the employer.

The Union agrees that Messrs. E. Poehlmann and A. Hallam of the Company may perform activities normally performed by Union employees from time to time. Notwithstanding article 1.03 of the Collective Agreement.

The Company agrees to pay the Union the premiums for the Union Dental Plan for the employees commencing August 1, 1981, thus starting the plan November 1, 1981.

The Company agrees to pay Union Dues for the current employees from the date of re-employment to December 31, 1981, with the exception of S. Roth's dues which would commence October 1, 1981."

7. Vaunclair Meats is much smaller than its predecessor — as might be expected since it only acquired a "part" of its predecessor's business. At the present time, there are only seven persons in the bargaining unit in active employment. The current dispute between the parties involves the status of Messrs. Latronico and Anastassiou and Ms. Arrangio — all of whom are specifically mentioned in the letter of understanding, and appear on the seniority list which is "schedule C" to the parties' collective agreement.

8. Latronico and Anastassiou have a right of first refusal with respect to any job openings which the employer may have; and Arrangio may be recalled as well. However, neither Latronico nor Anastassiou have ever actually worked for Vaunclair Meats. They were terminated by Vaunclair Purveyors shortly before it closed in September 1980, and were never hired or recalled by Vaunclair Meats. Of course, they have expressed an interest in employment with Vaunclair Meats, but the fact remains that they have never actually performed work or services for that company. There is some indication that since September 1980, Latronico and Anastassiou have been employed by other firms however there was no direct evidence on this matter and the parties' understanding was based solely on hearsay. There is also no evidence that these employees have recently contacted the intervener to indicate a current desire to return to work.

9. Arrangio was a temporary employee whose employment was terminated in December 1981, about six weeks before the instant application was filed. While that termination may be described as an "indefinite lay-off", there is no expectation that she will be

rehired/recalled in the near future. Latronico and Anastassiou would have to be recalled first and there is little prospect of anyone being hired for at least six or eight months.

10. Vaunclair Meats serves the restaurant trade, and that business has been seriously affected by the current economic decline. This, in turn, adversely affects Vaunclair Meats. It is not expected that there will be any upturn until at least the late fall of 1982 when the impending Christmas season may provide a stimulus for the intervener's business. In consequence, there is unlikely to be any possibility of recall for Anastassiou or Latronico until that time — if at all.

11. The intervener argues that the number of employees in the bargaining unit should be limited to the seven individuals actively employed at the time the application was made. The respondent union argues that to this group should be added the three individuals who have an interest in returning to work. That interest is based upon the fact that they were employed by the predecessor and have a right of first refusal under the agreement should any job opening arise. In the case of Ms. Arrangio, the union notes that she was recently employed. The union contends that in the circumstances of this case, the Board should depart from its usual approach to employee status questions (i.e. the so called "30 day rule"). The parties are content that the Board should determine both membership in the bargaining unit and (if necessary) eligibility to vote on the basis of the agreed facts set out above.

12. The Board has always recognized that the determination of employment status under a collective agreement may require a more flexible approach than the mechanical application of the common law indicia of employment. Employees may be on sick leave, or lay-off, or a leave of absence, or on strike, without severing their connection with or interest in the bargaining unit, and without terminating their employment status for collective bargaining purposes. An individual laid off, for example, may have a variety of rights even though he is no longer working for wages; and section 1(2) of the Act specifically provides that a person who quits work to engage in a strike does not thereby sever his employment relationship. There are circumstances in which a person should be considered to be an employee in the bargaining unit even though he was not actively employed on the date a representation application is made. The question is whether, in the present context, the subject employees have demonstrated a sufficient interest in the work and future of the bargaining unit, that they should be found to be included among its members and be entitled to participate in any representation vote affecting the unit's bargaining agent.

13. On the basis of the facts agreed by the parties, the Board is not satisfied that the three disputed individuals have a sufficient interest in the bargaining unit to be considered either members thereof or persons who should be entitled to cast ballots in a representation vote; and we see no reason why we should depart from the Board's usual approach to these matters. None of the individuals was working on the application date, had worked in the preceding 30 days or was expected to return in the following 30 days. Ms. Arrangio was laid off without any definite date or expectation of recall (see *Rix Athabasca Uranium Mines Limited*, [1961] OLRB Rep. July 127). Messrs. Latronico and Anastassiou have not worked in the bargaining unit for at least 18 months and there is no reasonable prospect of their being rehired until at least the late fall of 1982. If the economic situation does not improve, they may not be rehired at all, and even if they are offered jobs, they may not be prepared to return to work for the intervener. By that time, it will have been more than two years since they have worked for Vaunclair Purveyors, the intervener's predecessor, and they may have comfortably settled into alternative employment. In these circumstances, it appears to the Board that they

should not be regarded either as "employees" in the bargaining unit represented by the respondent or as persons who should be entitled to cast ballots should the Board order a representation vote. Their interest is too intangible and remote. Accordingly, we find that there are only seven employees in the bargaining unit for both purposes.

14. The second question before the Board is the voluntariness of the employee statement filed by Mr. Wilkinson in support of his application.

15. Mr. Wilkinson's own position is abundantly clear. He was employed by Vaunclair Purveyors from 1948 until September 1980. He continued to be employed by its successor, and concluded that union representation was inappropriate for the new enterprise — which as we have already noted, is very small in comparison with its predecessor. Mr. Wilkinson was opposed to, and intervened in, the successor rights application. He filed an earlier termination application; and, after the Board held that that application was untimely, filed a new application as soon as he learned that he was able to do so. The document purportedly indicating that the employees no longer wish to be represented by the respondent was signed in the company cafeteria in the space of a few minutes during a break. There were no members of management present. Four employees signed the document and three did not. According to Wilkinson, those three employees are the same ones who supported him in his earlier efforts to get rid of the union.

16. There are certain features of the evidence which, in other circumstances, might prompt the Board to infer that there was employer involvement in the origination (but not preparation or circulation) of the application seeking to terminate the union's bargaining rights, and such involvement might well raise doubts about the voluntariness of the employee petition. In particular, we were concerned about a conversation which a foreman of the respondent had with Mr. Wilkinson concerning the imminent termination of the subsisting collective agreement which, of course, is critical to the timeliness of a termination application. However, there is no doubt about Mr. Wilkinson's views concerning trade union representation nor is there any suggestion that he needed any prompting. After all, he had sought to terminate the union's bargaining rights twice before. Mr. Wilkinson testified that the petition in support of this application was simply what he had written before, and involved the same employees as he had approached before. In the circumstances, the Board is satisfied that the applicant has met the requirements of section 57 and that this is an appropriate case for testing the union's support in a representation vote.

17. The Board finds that not less than forty-five per cent of the employees of the intervener in the bargaining unit, at the time the application was made, have voluntarily signified in writing that they no longer wish to be represented by the respondent union on February 18, 1982, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining the the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent union under section 57(3) of the said Act.

18. The Board directs that a representation vote be taken of the employees of the intervener. Those eligible to vote are all employees of the intervener employed at Metropolitan Toronto, the County of York and the Township of Chinquacousy, save and except, foremen, persons above the rank of foreman, and office staff, on the date hereof who do not voluntarily

terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

19. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with the intervener.

20. The matter is referred to the Registrar.

2460-81-R Welland Typographical Union, Local 927, Applicant, v. **Welland Evening Tribune**, a Division of Canadian Newspapers Company Limited, Respondent, v. Group of Employees, Objectors

Bargaining Unit – Dispute whether Editorial Department properly included in office, clerical and sales unit – Parties agreeing to seek wishes of editorial employees – Board directing vote to ascertain wishes of editorial employees

BEFORE: M. G. Picher, Vice-Chairman, and Board Members J. A. Ronson and S. Cooke.

APPEARANCES: *Mary Cornish, R. Weatherdon, R. Earles, D. Esposti and S. Lund for the applicant; D. W. Brady, W. J. Ryrie and J. Van Kooten for the respondent; Glenn Mullis for the objectors.*

DECISION OF THE BOARD; March 26, 1982

1. This is an application for certification.

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3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

4. The petitions filed in opposition to the application were not numerically relevant as none of the signatures upon them overlap the signatures on the union membership evidence filed. The Board did not, therefore, inquire into the origination and circulation of the statements of objection.

5. The respondent submits that the employees should be divided into two units for collective bargaining purposes, namely, employees in the editorial department on the one hand and employees in all other unorganized departments (being office, clerical and sales employees) on the other hand. The respondent already has two production bargaining units, which include five pressmen and fifteen composing room employees. The union submits that the editorial staff should be bargaining in the same unit as the office, clerical and sales employees.

6. As the representations of the parties suggest, there appears to be little consistency in

the pattern of white-collar newspaper bargaining units in Canada. In some newspapers journalists bargain separately while in others they are included in comprehensive units with office, clerical and sales staff. In this case the parties had very differing views of what the editorial employees would want.

7. Since the Board's decision in *The Spectator*, [1981] OLRB Rep. Aug. 1177, it has taken an open and pragmatic attitude to the rationalizing of bargaining structures in applications for certification in the newspaper industry (see *Peterborough Examiner*, [1982] OLRB Rep. Mar. 432. It appears to us more constructive to allow the Board's approach to evolve on a case by case basis, allowing both the parties involved in the industry and the Board the benefit from the acquired knowledge of the cases as they develop. The Board's desire to retain some flexibility and tailor the bargaining unit to the circumstances of each case was reflected in its comments in the *Peterborough Examiner* on the very issue raised in this case:

On the basis of the material before us and the representations of the parties we are not, however, persuaded that a single bargaining unit is appropriate in the circumstances of this case. In a small newspaper where employees perform a range of functions, or where the number of employees in separate editorial, clerical and production units might be too small to generate an effective bargaining presence, a different result might obtain. In those circumstances employees in the various departments of a newspaper may be seen by the Board as having a sufficient community of interest to bargain as a single unit. Where, however, office clerical and sales employees on the one hand, and editorial staff on the other hand, are found in numbers sufficient to establish viable bargaining structures that can adequately represent their separate interests the Board will be open to separate units along the lines suggested in *The Spectator*. As the NLRB approach and the history of collective bargaining for journalists in Canada suggest there is substantial precedent for editorial staff bargaining as a separate unit in appropriate circumstances (see generally, Royal Commission of Newspapers, Volume 5, Research Publications, "*Labour Relations in the Newspaper Industry*" (1981) (*The Kent Commission*)).

8. In this case the parties agreed that the wishes of the editorial staff should be canvassed and be part of the evidence available to the Board to assist in its determination of the bargaining unit. To that end they have agreed to the taking of a vote among the editorial staff to determine whether they wish to bargain separately or in a larger unit including office, clerical and sales staff. While the Board does not normally canvass the wishes of individual employees on their preference of bargaining structure, it has the latitude to do so under section 6(1) of the Act. In the special circumstances of this case, given the agreement of the parties and the likelihood of an early vote, we see no reason not to do so. The applicant will be certifiable whether the Board establishes one or two bargaining units. A vote of the employees in the editorial department of the respondent shall therefore be taken, the ballot to be in the form agreed by the parties in consultation with the Labour Relations Officer. The voting constituency shall be:

All editorial employees of the respondent, save and except publisher, managing director, city editor, news/wire editor, persons regularly

employed for not more than 24 hours per week and students employed in the school vacation period.

9. The returning officer is instructed to segregate any ballot cast by Wayne Redshaw, described by the respondent as sports editor.
 10. The Board hereby appoints a Labour Relations Officer to inquire into and report to the Board on the duties and responsibilities of sports editor and secretary to the publisher.
 11. The matter is referred to the Registrar.
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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING FEBRUARY 1982

BARGAINING AGENTS CERTIFIED

No Vote Conducted

0958-81-R: United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Clarence H. Graham Construction Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (47 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Grey, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (47 employees in unit).

1392-81-R: United Brotherhood of Carpenters and Joiners of America Local 785, (Applicant) v. Watcon Inc., (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (21 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Wellington and in the Regional Municipality of North Dumfries Township, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (21 employees in unit).

1790-81-R: United Steelworkers of America, (Applicant) v. Conair Canada Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Township of West Gwillimbury, save and except foremen, persons above the rank of foremen, office and sales staff". (21 employees in unit).

1907-81-R: Retail, Commercial & Industrial Union, Local 206 chartered by the United Food & Commercial Workers International Union, C.L.C., A.F.L., -C.I.O., (Applicant) v. Preston Springs Gardens Retirement Home, (Respondent).

Unit #1: "all employees of the respondent at Cambridge, Ontario, save and except the Administrator, persons above the rank of Administrator, Housekeeping Laundry Supervisor, Maintenance Supervisor, Food Service Supervisor, Registered Nurses, Graduate Nurses, office and clerical staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (21 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: "all employees employees of the respondent at Cambridge, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except Administrator, persons above the rank of Administrator, Housekeeping Laundry, Supervisor, Maintenance Supervisor, Food Service Supervisor, Registered Nurses, Graduate Nurses,

and office and clerical staff" (12 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1921-81-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Canadian National Exhibition Association, (Respondent) v. Mechanical Contractors Association Ontario, (Intervener).

Unit: "all employees of the respondent employed as plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the Municipality of Metropolitan Toronto, save and except foremen and persons above the rank of foreman". (12 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2005-81-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 3227, and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Pilex Enterprises Limited carrying on business under the firm name and style of Special Foundation Systems, (Respondent) v. Labourers' International Union of North America, Local 183, (Intervener).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen, persons above the rank of non-working foreman, and persons covered by subsisting collective agreements between the Respondent and Labourers' International Union of North America, Local 183". (2 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen, persons above the rank of non-working foreman, and persons covered by subsisting collective agreements between the Respondent and Labourers' International Union of North America, Local 183". (2 employees in unit).

2051-81-R: Canadian Union of Public Employees, (Applicant) v. The Canadian Jewish Congress, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except the National Director and persons above the rank of National Director". (3 employees in unit). (*Having regard to the agreement of the parties*).

2052-81-R: Millworkers Local #802 — United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Al's Woodworking Limited, (Respondent).

Unit: "all employees of the respondent in the City of Windsor, save and except foremen, persons above the rank of foreman and office staff". (3 employees in unit). (*Having regard to the agreement of the parties*).

2071-81-R: Ontario Public Service Employees Union, (Applicant) v. Arnprior and District Ambulance Service, Douglas R. Powell, (Respondent).

Unit: "all employees of the respondent at Arnprior, Ontario, save and except owner-operator". (5 employees in unit). (*Having regard to the agreement of the parties*).

2122-81-R: Home Care Employees' Association, (Applicant) v. Home Care Program for Metropolitan Toronto Incorporated, (Respondent).

Unit #1: "all employees of the Home Care Program for Metropolitan Toronto Incorporated working in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of

supervisor, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (85 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the Home Care Program for Metropolitan Toronto Incorporated working in the Municipality of Metropolitan Toronto who are regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisor and persons above the rank of supervisor". (36 employees in unit). (*Having regard to the agreement of the parties*).

2133-81-R: Local Union 2228 of the International Brotherhood of Electrical Workers, (Applicant) v. Rockland Hydro Electric Commission, (Respondent).

Unit: "all employees of the respondent at Rockland, save and except office and clerical employees". (3 employees in unit). (*Having regard to the agreement of the parties*).

2147-81-R: Ontario Nurses' Association, (Applicant) v. Sidbrook Private Hospital, (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent in Cobourg, save and except the Director of Nursing and persons above the rank of Director of Nursing". (8 employees in unit). (*Having regard to the agreement of the parties*).

2159-81-R: Ontario Public Service Employees Union, (Applicant) v. Superior Ambulance Limited, (Respondent).

Unit: "all employees of the respondent in the City of Hamilton and the Town of Stoney Creek, save and except supervisors, persons above the rank of supervisor, office and clerical staff". (27 employees in unit). (*Having regard to the agreement of the parties*).

2163-81-R: Retail, Wholesale and Department Store Union, AFL: CIO: CLC:, (Applicant), v. E. Lee Drugs Limited, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto save and except graduate and undergraduate pharmacists, merchandise manager and persons above the rank of merchandise manager". (33 employees in unit). (*Having regard to the agreement of the parties*).

2168-81-R: Service Employees Union, Local 204, Affiliated with A.F. of L. - C.I.O.; C.L.C., (Applicant) v. Etobicoke General Hospital, (Respondent).

Unit: "all employees of Etobicoke General Hospital in Rexdale, Ontario regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period save and except supervisor persons above the rank of supervisors, registered and graduate nursing staff, paramedical employees, office staff, security guards and persons covered by subsisting collective agreements". (155 employees in unit).

2175-81-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Victoria Transport Inc., (Respondent) v. Canadian Transportation Workers' Union No. 194, N.C.C.L., (Intervener).

Unit: "all employees of the respondent working in or out of Ontario, save and except foremen, persons above the rank of foreman, office staff, dispatchers, and persons regularly employed for not more than twenty-four hours per week". (17 employees in unit).

2182-81-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. Judricks Enterprises Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Windsor, Ontario, save and except foremen, persons above

the rank of foreman, and office and sales staff". (16 employees in unit). (*Having regard to the agreement of the parties*).

2192-81-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Rosen Fuels Limited, (Respondent).

Unit: "all employees of the respondent at Kingston, Ontario, save and except dispatchers, supervisors, those above the rank of dispatcher and supervisor, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (9 employees in unit). (*Having regard to the agreement of the parties*).

2196-81-R: United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO-CLC, (Applicant) v. Space Circuits Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at the City of Waterloo, save and except foremen, persons above the rank of foreman, office, clerical, technical and sales staff and those persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (75 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2199-81-R: Local No. #802 — United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Industrial Fabricators Ltd., (Respondent).

Unit: all employees of the respondent at Kingsville, Ontario, save and except Assistant Foremen and persons above the rank of Assistant Foreman, Time Keeper and office staff". (18 employees in unit). (*Having regard to the agreement of the parties*).

2209-81-R: Ontario Public Service Employees Union, (Applicant) v. The Corporation of the Township of Amherst Island, (Respondent).

Unit: "all employees of the respondent in the Township of Amherst Island save and except ferry captains, road superintendent, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (25 employees in unit). (*Having regard to the agreement of the parties*).

2210-81-R: Service Employees Union, Local 204 Affiliated with A.F. of L., C.I.O., C.L.C., (Applicant) v. Resortland Hotels Ltd., carrying on business as Anndore Hotel, (Respondent).

Unit: "all employees of the respondent employed at the Anndore Hotel in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (34 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2211-81-R: Canadian Union of Public Employees, (Applicant) v. Corporation of the Township of Plympton, (Respondent).

Unit: "all employees of the respondent in the Township of Plympton, in the County of Lambton, save and except the road superintendent, persons above the rank of road superintendent, office and clerical staff, the clerk, the treasurer, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period. (4 employees in the unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2214-81-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 3327, and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Drew-Con Construction, (Respondent).

Unit #1: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman”. (2 employees in the unit).

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman”. (2 employees in the unit).

2216-81-R: Fuel, Bus, Limousine, Petroleum Drivers and Allied Employees Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Sheraton Reservations Corporation c.o.b. as Out of Town Reservations, (Respondent).

Unit: “all employees of the respondent in Metropolitan Toronto, save and except Senior Sales Agent, persons above the rank of Senior Sales Agent, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period”. (9 employees in unit). (*Having regard to the agreement of the parties*).

2224-81-R: United Textile Workers of America, (Applicant) v. Burmac International, (Respondent).

Unit: “all employees of the respondent at its plants in St. Catharines, Ontario, save and except foremen, persons above the rank of foreman, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period”. (54 employees in unit). (*Having regard to the agreement of the parties*).

2230-81-R: Service Employees International Union Local 268. (Applicant) v. Lake Superior Board of Education, (Respondent).

Unit: “all employees of the respondent in the District of Thunder Bay engaged in maintenance services and plant operations, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except foremen, persons above the rank of foreman, and persons covered by subsisting collective agreements”. (12 employees in unit). (*Having regard to the agreement of the parties*).

2241-81-R: Labourers’ International Union of North America, Local 1036, (Applicant) v. I.C.G., Canadian Propane Ltd., (Respondent).

Unit: “all employees of the respondent at Wawa, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period”. (8 employees in unit). (*Having regard to the agreement of the parties*).

2241-81-R: Labourers’ International Union of North America, Local 1036, (Applicant) v. I.C.G., Canadian Propane Ltd., (Respondent).

Unit: “all employees of the respondent at Blind River, Ontario, save and except foremen, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period”. (9 employees in unit). (*Having aregard to the agreement of the parties*).

2248-81-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. The Packaging Group of Domtar Inc. — Recycling Division, (Respondent).

Unit: "all employees of the respondent at 451 Front Street East, Toronto, Ontario, save and except foremen and dispatchers, persons above the rank of foreman and dispatcher, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements". (22 employees in unit). (*Having regard to the agreement of the parties*).

2258-81-R: Local 636 of the International Brotherhood of Electrical Workers, (Applicant) v. The Aurora Hydro Electric Commission, (Respondent).

Unit: "all employees of the respondent at Aurora, Ontario, save and except foremen, persons above the rank of foreman, and office staff". (5 employees in unit). (*Having regard to the agreement of the parties*).

2259-81-R: Canadian Union of Public Employees, (Applicant) v. VS Services Ltd., (Respondent).

Unit: "all employees of the respondent at St. John's Convalescent Hospital in Willowdale, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except dietitian, chef, office and clerical employees, supervisors and persons above the rank of supervisor". (25 employees in unit). (*Having regard to the agreement of the parties*).

2260-81-R: United Steelworkers of America, (Applicant) v. A. & G. Iron Works Ltd., (Respondent).

Unit: "all employees of the respondent in the District of Algoma, save and except foremen, persons above the rank of foreman, office and sales staff". (5 employees in unit). (*Having regard to the agreement of the parties*).

2263-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Sera Construction Limited, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (4 employees in unit).

2264-81-R: Ontario Nurses' Association, (Applicant) v. Leisure World Nursing Homes Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all registered and graduate nurses regularly employed for not more than twenty-four (24) hours per week in a nursing capacity of Leisure World Nursing Homes Limited in the City of Toronto, save and except the director of care (nursing), the assistant director of care (nursing) the evening supervisor, the night supervisor, the relief supervisor and the weekend supervisor". (20 employees in unit). (*Clarity Note*).

2280-81-R: Ready-Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers Local 230, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Arthur Mitchell Building Supply Centre, (Respondent).

Unit: "all employees of the respondent at Pickering, Ontario save and except foremen, persons above the rank of foreman, office and sales staff". (4 employees in unit). (*Having regard to the agreement of the parties*).

2288-81-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Titan Proform Company Limited, (Respondent).

Unit: “all office, clerical and technical employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, nurse, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements”. (8 employees in unit). (*Having regard to the agreement of the parties*).

2297-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Pyramid Construction Limited, (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman”. (5 employees in unit).

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

2007-81-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. Blue Line Taxi Co. Limited, (Respondent).

Unit #1: “all bus drivers of the respondent in the City of Ottawa save and except supervisors and persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period”. (12 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters’ list		12
Number of persons who cast ballots		11
Number of ballots marked in favour of applicant	10	
Number of ballots marked against applicant	1	

Unit #2: “all bus drivers of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period in the City of Ottawa, save and except supervisors and persons above the rank of supervisor”. (3 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters’ list		3
Number of persons who cast ballots		2
Number of ballots marked in favour of applicant	2	
Number of ballots marked in against applicant	0	

2105-81-R: United Steelworkers of America, (Applicant) v. Overhead Door Company of Canada Limited, (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local Union 2679, (Intervener).

Unit: “all employees of the respondent in Oakville, Ontario save and except non-working foremen, persons above the rank of foreman, office and sales staff”. (140 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters’ list		124
Number of persons who cast ballots		88
Number of ballots marked in favour of applicant	85	
Number of ballots marked in favour of intervener	3	

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

1763-81-R: United Food and Commercial Workers International Union Local 1000A, A.F.L. C.I.O. C.L.C., (Applicant) v. Cara Operations Limited (Retail Stores Division), (Respondent).

Unit: "all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period in its gift stores and drug stores at Terminal 1 and Terminal 2, Toronto International Airport, Malton, Ontario save and except assistant managers, supervisors, persons above the rank of assistant manager or supervisor, pharmacists and office and clerical staff". (57 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	6
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	0

1836-81-R: Teamsters Union Local 938, (Applicant) v. Steinman Transportation Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Mississauga, Ontario, save and except dispatchers, persons above the rank of dispatcher, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the summer vacation period". (28 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	22
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	9

1946-81-R: Retail Clerks Union, Local 409, (Applicant) v. Beaver Foods Limited, (Respondent).

Unit: "all employees of the respondent at Lakehead University, Thunder Bay, Ontario, save and except supervisors, those above the rank of supervisor, chef and office staff". (57 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	57
Number of persons who cast ballots	50
Number of ballots marked in favour of applicant	34
Number of ballots marked against applicant	16

Applications for Certification Dismissed — No Vote Conducted

1117-81-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Finlandia Sauna, (Respondent).

1427-81-R: Labourers' International Union of North America Local 1081, (Applicant) v. Watcon Inc., (Respondent) v. Group of Employees, (Objectors).

1811-81-R: International Union of Operating Engineers, Local 793, (Applicant) v. Finch Paving, (Respondent).

2168-81-R: Service Employees Union, Local 204, Affiliated with A.F. of L. -C.I.O., C.L.C., (Applicant) v. Etobicoke General Hospital, (Respondent).

2179-81-R: Sunnybrook Hospital Employees' Union, Local 777, Service Employees' International Union, (Applicant) v. Sunnybrook Hospital, (Respondent).

2287-81-R: Canadian Union of Operating Engineers & General Workers, (Applicant) v. Campeau Corporation (Place De Ville, Ottawa), (Respondent).

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

0643-81-R: United Electrical, Radio and Machine Workers of America (UE), (Applicant) v. SGS Supervision Services Inc. Qualitest Technical, (Respondent).

Unit: "all employees of the respondent engaged in pipe inspection, working out of the respondent's premises at Welland, Ontario, save and except foremen, those above the rank of foreman, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (48 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	44
Number of persons who cast ballots	44
Number of ballots marked in favour of applicant	20
Number of ballots marked against applicant	20
Ballots segregated and not counted	4

1993-81-R: Canadian Merchandising Employees' Union, (Applicant) v. Amoco Fabrics Ltd., (Respondent) v. International Woodworkers of America, Local 2-600, (Intervener).

Unit: "all employees of the respondent at Hawkesbury, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, laboratory technician personnel, industrial engineering personnel and guards". (439 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	416
Number of persons who cast ballots	316
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	45
Number of ballots marked in favour of intervener	200
Ballots segregated and not counted	69

2009-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. York Condominium Corporation No. 212, and/or Westwood Property Management Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent engaged in cleaning and maintenance at 11 Wincott Drive, Weston, including resident superintendents, save and except property manager, those above the rank of property manager, office and clerical staff". (4 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	4
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	2

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

1908-81-R; 1909-81-R; 1925-81-R; London and District Service Workers' Union, Local 220 SEIU - AFL - CIO - CLC, (Applicant) v. Coronet Motor Hotel, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Kitchener, Ontario, save and except supervisors and persons above the rank of supervisors". (84 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		92
Number of persons who cast ballots		74
Number of ballots marked in favour of applicant	17	
Number of ballots marked against applicant	56	
Ballots segregated and not counted	1	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

2151-81-R: International Woodworkers of America, (Applicant) v. Sherwood Tree Service, (Respondent).

2180-81-R: United Steelworkers of America, (Applicant) v. Camco Incorporated (GSW Home Service), (Respondent).

2215-81-R: Canadian Union of Public Employees, (Applicant) v. St. John's Convalescent Hospital, (Respondent).

2241-81-R: International Association of Machinists and Aerospace Workers, Thunder Bay Lodge 1120, (Applicant) v. Harry's Shell Service (Harry Barrow and Frederick Barrow of Thunder Bay Incorporated), (Respondent).

2242-81-R: International Association of Machinists and Aerospace Workers, Thunder Bay Lodge 1120, (Applicant) v. Bumper to Bumper (Harry Barrow Enterprises Limited), (Respondent).

2257-81-R: United Steelworkers of America, (Applicant) v. Canadian Window Coverings Corporation, (Respondent).

2262-81-R: Energy and Chemical Workers Union, (Applicant) v. Chemical and Petro Waste Disposal Limited, (Respondent).

2267-81-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Rose City Ford Sales Limited, (Respondent).

2283-81-R: International Union of Allied, Novelty and Production Workers, Local 905, (Applicant) v. Central Hospital, (Respondent) v. Canadian Union of Operating Engineers & General Workers, (Intervener).

2293-81-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Bot Construction (Canada) Limited, (Respondent).

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1251-81-R: The Toronto Central Ontario Building and Construction Trades Council on its own behalf and on behalf of its affiliates, (Applicant) v. Norfinch Developments Limited, Norfinch Investments (Canada) Limited, Norfinch Construction (Trans-Canada) Limited, Norfinch Construction (Toronto) Limited, Norfinch Construction (Canada) Limited, Samteit Investments Limited, Samteit Developments Inc., Samteit Corporation, (Respondents). (*Granted*).

1477-81-R; 1478-81-R: Ottawa Typographical Union, Local 102, (Complainant/ Applicant) v. The Winchester Press Limited, 2Womor Publications Inc., Winchester Print (1981) Inc., Maxime Baldwin and Brian Raistrick operating under the business name of Winchester Print, (Respondents). (*Dismissed*).

SALE OF BUSINESS

1250-81-R: The Toronto Central Ontario Building and Construction Trades Council on its own behalf and on behalf of its affiliates, (Applicant) v. Norfinch Developments Limited, Norfinch Investments (Canada) Limited, Norfinch Construction (Trans-Canada) Limited, Norfinch Construction (Toronto) Limited, Norfinch Construction (Canada) Limited, Samteit Investments Limited, Samteit Developments Inc., Samteit Corporation, (Respondents). (*Dismissed*).

1475-81-R; 1476-81-R: Ottawa Typographical Union, Local 102, (Complainant/ Applicant) v. The Winchester Press Limited, 2Womor Publications Inc., Winchester Print (1981) Inc., Maxime Baldwin and Brian Raistrick operating under the business name of Winchester Print, (Respondents). (*Granted*).

2089-81-R: Ontario Council of the International Brotherhood of Painters and Allied Trades, (Applicant) v. North York Interior, Drywall Systems Limited and Gioia Investments Inc. and Teston Construction Co. Ltd., (Respondents). (*Withdrawn*).

2207-81-R: International Brotherhood of Electrical Workers, Local 636, (Applicant) v. Burns Electronic Security Services Limited, Wells Fargo Alarm Services of Canada Limited, and Pony Express Residential Security Inc., (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1780-81-R: Hilliard Honsberger, (Applicant) v. Office and Professional Employees International Union — Local #263, (Respondent) v. Lord & Burnham Co. Limited, (Intervener) v. Employees, (Objectors).

Unit: “all employees of the intervener employed at St. Catharines, Ontario, save and except supervisors, persons above the rank of supervisor, confidential clerks, outside salesmen, draftsmen, outside construction employees and part-time employees who work less than twenty-four (24) hours per week, or who are students employed during the vacation period”. (*Granted*).

Number of names of persons on list as originally prepared by employer	11
Number of persons who cast ballots	10
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	9

1891-81-R: All Security Investigators employed by the Toronto Transit Commission covered by the agreement between the Commission and the United Plant Guard Workers of America Local 1962, (Applicant) v. Amalgamated Plant Guards, Local 1962, United Plant Guard Workers of America, (Respondent) v. Toronto Transit Commission, (Intervener).

Unit: “those regular and temporary (including students) employees of the Safety and Security Department in the job classifications Security Investigator and Senior Security Investigator, save and except temporary help supplied by manpower supply firms employed for periods not in excess of four (4) calendar weeks, employees of the Toronto Transit Commission or Gray Coach Lines Ltd. not regularly employed in this unit who are temporarily utilized by the Commission to service an

emergency, persons regularly employed for not more than 24 hours per week or as mutually agreed between the Commission and the Union". (*Granted*).

Number of names of persons on list as originally prepared by employer	14
Number of persons who cast ballots	12
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	12

1931-81-R: Scott Winhall, (Applicant) v. Graphic Arts International Union Local 211, (Respondent).

Unit: "all photoengravers and apprentices in the employ of P. R. Graphics Limited in the City of Mississauga, save and except manager, persons above the rank of manager and artists". (*Granted*).

Number of persons on list as originally prepared by employer	2
Number of persons who cast ballots	2
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	2

1955-81-R: William Krezanowski, (Applicant) v. Canadian Food and Allied Workers Local 598 Chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, (Respondent).

Unit: "all its Regular employees at the Whitby Plant excluding plant superintendents, warehouse superintendents, fieldmen, office and sales staff, seasonal production employees, and all other employees excluded by the Labour Relations Act of the Province of Ontario". (*Dismissed*).

Number of names of persons on revised voters' list	55
Number of persons who cast ballots	43
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list	42
Number of ballots marked in favour of respondent	27
Number of ballots marked against respondent	15
Ballots segregated and not counted	1

1985-81-R: Jim Waddell, (Applicant) v. Canadian Union of Public Employees and its Local 2387, (Respondent) v. Capreol Bus Services, (Intervener).

Unit: "all employees of Capreol Bus Services in the Town of Capreol, Ontario, regularly employed for not more than 24 hours per week, save and except manager and persons above the rank of manager and office staff". (*Granted*).

Number of names of persons on list as originally prepared by employer	14
Number of persons who cast ballots	13
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	10

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0611-81-U: Eugene Vaillancourt, (Complainant) v. International Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., Local 222 and General Motors of Canada Limited, Oshawa, Ontario, (Respondents). (*Dismissed*).

0896-81-U: Canadian Association of Burlesque Entertainers, Local 1689, (Complainant) v. Colonial Tavern Limited, (Respondent). (*Withdrawn*).

1274-81-U: Ottawa Typographical Union, Local 102, (Complainant/Applicant) v. The Winchester Press Limited, 2Womor Publications Inc., Winchester Print (1981) Inc., Maxime Baldwin and Brian Raistrick operating under the business name of Winchester Print, (Respondents). (*Dismissed*).

1275-81-U: Ottawa Typographical Union, Local 102, (Complainant/ Applicant) v. The Winchester Press Limited, 2Womor Publications Inc., Winchester Print (1981) Inc., Maxine Baldwin and Brian Raistrick operating under the business name of Winchester Print, (Respondents). (*Granted*).

1513-81-U: Kenneth Michael Tonge, (Complainant) v. Teamsters Local Union No. 419, (Respondent) v. Consumers Distributing Company Limited, (Intervener). (*Dismissed*).

1622-81-U: Ontario Nurses' Association, (Complainant) v. Edward Street Manor Nursing Home, (Respondent). (*Granted*).

1700-81-U; 1701-81-U: Commercial Workers Union Local 486, (Complainant) v. Santa Maria Foods and Pasquale Rosati, (Respondent). (*Granted*).

1710-81-U: Roger Beamish, (Complainant) v. Canadian Union of Public Employees — C.L.C. Ontario Hydro Employees Union Local 1000, (Respondents). (*Dismissed*).

1726-81-U: Hein Walma on his own behalf and on behalf of a group of employees, (Complainant) v. Canadian Union of Public Employees, Local 1000, Ontario Hydro Employees' Union, (Respondents). (*Withdrawn*).

1784-81-U: The United Brotherhood of Carpenters and Joiners of America and its Local Union 2679, (Complainant) v. Whitby Boat Works Limited, (Respondent). (*Granted*).

1853-81-U: Canadian Union of Public Employees, (Complainant) v. Sunnycrest Nursing Homes Limited, (Respondent). (*Granted*).

1895-81-U: Shopmen's Local Union No. 834 of the International Association of Bridge, Structural and Ornamental Ironworkers, (Complainant) v. Rapistan Systems Limited and William Miln, (Respondents). (*Withdrawn*).

1896-81-U: The Canada Metal Company Ltd., (Complainant) v. Energy and Chemical Workers Union, Local 2, (Respondent). (*Withdrawn*).

1942-81-U: Lawrence Pelletier, (Complainant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) through the Eltra Unit of Local 252, (Respondent) v. Prestolite Battery Division of Eltra of Canada Ltd., (Intervener). (*Dismissed*).

2068-81-U: Labourers' International Union of North America, Local 183, (Complainant) v. York Condominium Corporation No. 255, (Respondent). (*Withdrawn*).

2124-81-U: Jim Waddell, (Complainant) v. Canadian Union of Public Employees Local 2387, (Respondent). (*Withdrawn*).

2127-81-U: Canadian Paperworkers Union Local 134, (Applicant) v. Abitibi-Price Inc., (Respondent). (*Withdrawn*).

2134-81-U: Food and Service Workers, of Canada, (Complainant) v. Zum Rudy's Foods Limited, (Respondent). (*Withdrawn*).

2146-81-U: Harold Giffening, (Complainant) v. U.A.W. Local 399, (Respondent). (*Withdrawn*).

2152-81-U: Steven R. Denzau, Bruce Denzau, John Miland, Canadian Union of Operating Engineers & General Workers, (Complainant/Applicants) v. Canadian Union of Operating Engineers and General Workers, A. E. LePage (Ontario) Limited, (Respondents). (*Dismissed*).

2157-81-U: The United Brotherhood of Carpenters and Joiners of America and its Local Union 2679, (Complainant) v. Whitby Boat Works Limited, (Respondent). (*Withdrawn*).

2164-81-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Complainant) v. Shoppers Drug Mart/Edlee Drugs Ltd., (Respondent). (*Withdrawn*).

2176-81-U: United Food and Commercial Workers International Union, Local 175, (Complainant) v. Trophy Nuts Limited, (Respondent). (*Withdrawn*).

2195-81-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Complainant) v. Shoppers Drug Mart/Edlee Drugs Ltd., (Respondent). (*Withdrawn*).

2202-81-U: Ralph Kempton and Roy Rogers, (Complainants) v. United Steelworkers of America, Local Union #5958, (Respondent). (*Withdrawn*).

2213-81-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Complainant) v. Data Ribbon Limited, (Respondent). (*Withdrawn*).

2233-81-U: Teamsters Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. St. Thomas Sanitary Collection Service Ltd., (Respondent). (*Withdrawn*).

2226-81-U: Raymond Charlebois, (Complainant) v. Labourers' International Union of North America, Local 183, (Respondent) v. York Condominium Corporation No. 255, (Intervener). (*Withdrawn*).

2227-81-U: Jean-Guy Mathieu, (Complainant) v. CUPE Local 6, (Respondent). (*Withdrawn*).

2229-81-U: Canadian Union of Operating Engineers & General Workers, (Complainant) v. Promotional Packaging Products Limited, (Respondent). (*Withdrawn*).

2231-81-U: The International Beverage Dispensers' and Bartenders' Union, Local 280, (Complainant) v. Molly & Me Tavern Ltd. and Albert Nightingale and Mollie Nightingale, (Respondents). (*Withdrawn*).

2232-81-U: Judith Stone, (Complainant) v. Teamsters Local 647, (Respondent). (*Withdrawn*).

2233-81-U: Judith Stone, (Complainant) v. Cadbury, Schweppes Powell Inc., (Respondent). (*Withdrawn*).

2255-81-U: Mrs. Dorothy Rumble, (Complainant) v. Local 1325 UAW Canadian Fabricated Ltd., (Respondent). (*Withdrawn*).

2284-81-U: United Steelworkers of America, (Complainant) v. Tru-View Aluminum Products, (Respondent). (*Withdrawn*).

2301-81-U: International Union of Allied Novelty and Production Workers, Local 905, (Applicant) v. Canadian Atlas Furniture Mfg. Ltd., (Respondent). (*Withdrawn*).

2361-81-U: Joseph Sadler, (Complainant) v. International Union Automobile, Aerospace and Agricultural Implement Workers of America (UAW-CLC) Local 1967 and McDonnell Douglas Canada Ltd., (Respondents). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO PROSECUTE

1785-81-U: The United Brotherhood of Carpenters and Joiners of America and its Local Union 2679, (Applicant) v. Whitby Boat Works Limited, (Respondent). (*Withdrawn*).

2123-81-U: Jim Waddell, (Applicant) v. Canadian Union of Public Employees Local 2387, (Respondent). (*Withdrawn*).

2126-81-U: Canadian Paperworkers Union Local 134, (Applicant) v. Abitibi-Price Inc., (Respondent). (*Withdrawn*).

2158-81-U: The United Brotherhood of Carpenters and Joiners of America and its Local Union 2679, (Applicant) v. Whitby Boat Works Limited, (Respondent). (*Withdrawn*).

APPLICATIONS FOR RELIGIOUS EXEMPTION

1076-81-M: Gerald O. Aspinall, (Applicant) v. The York University Faculty Association, (Respondent Trade Union) v. The Board of Governors of York University, (Respondent Employer). (*Dismissed*).

1077-81-M: Walter Beringer, (Applicant) v. The York University Faculty Association, (Respondent Trade Union) v. The Board of Governors of York University, (Respondent Employer). (*Dismissed*).

1526-81-M: James S. Tait, (Applicant) v. The York University Faculty Association, (Respondent Trade Union) v. The Board of Governors of York University, (Respondent Employer). (*Granted*).

JURISDICTIONAL DISPUTES

0686-81-JD: Harold R. Stark Company Limited, (Complainant) V. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local 463, Labourers' International Union of North America, Local 597, Labourers' International Union of North America, Ontario Provincial District Council, A Council of Trade Unions for Teamsters Local 230, and Labourers' Union, Local 597, (Respondents) v. Oshawa Paving Ltd., Oshawa Area Signatory Contractors, (Intervener). (*Terminated*).

1256-81-JD: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 71, (Complainants) v. The Civic Hospital, Concordia Management Co. Ltd., Q-Mech, Q-Mech Plumbing & Heating, and Watts & Henderson (Ottawa) Ltd., (Respondents). (*Withdrawn*).

1786-81-JD: Labourers' International Union of North America, and Labourers' International Union of North America, Local 1059, (Complainants) v. Ontario Hydro, United Association of the Plumbing and Pipefitting Industry of the United States and Canada, and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 527, (Respondents). (*Terminated*).

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

0079-81-M: Ontario Nurses' Association, (Applicant) v. Ontario Nurses' Association Staff Union, (Respondent). (*Granted for 2 employees*). (*Dismissed for 3 employees*).

1267-81-M: Service Employees Union, Local 268, (Applicant) v. St. Joseph's General Hospital, (Respondent). (*Withdrawn*).

1396-81-M: Canadian Union of Public Employees, Local 2357, (Applicant) v. Ottawa Roman Catholic Separate School Board, (Respondent). (*Withdrawn*).

1590-81-M: Regional Municipality of Hamilton-Wentworth, (Applicant) v. Ontario Nurses' Association, Local 72, (Respondent). (*Withdrawn*).

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2207-80-OH: B. Porter and W. West, LU 1005, (Complainants) v. The Steel Company of Canada, Ltd., (Respondent). (*Dismissed*).

2228-80-OH: L. Laskowski, W. West, LU 1005, (Complainants) v. The Steel Company of Canada, Ltd., (Respondent). (*Dismissed*).

2229-80-OH: J. Seager and W. West, LU 1005, (Complainants) v. The Steel Company of Canada, Ltd. (Respondent). (*Dismissed*).

2382-80-OH: D. Watson and W. West, LU 1005, (Complainants) v. The Steel Company of Canada, Ltd., (Respondent). (*Dismissed*).

2197-81-OH: Keith Riley, (Complainant) v. Metro Toronto News Company, (Respondent). (*Withdrawn*).

COLLEGES COLLECTIVE BARGAINING ACT

Unfair Labour Practice

2169-81-U: Ontario Public Service Employees Union, (Complainant) v. Algonquin College and Mrs. N. Toole, (Respondent). (*Withdrawn*).

CONSTRUCTION INDUSTRY GRIEVANCES

1875-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, (Applicant) v. Ontario Hydro, (Respondent). (*Granted*).

1958-81-M: Millwright Local 1425, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Bedard Girard Ontario, A Division of B.G. Checo International Limited, (Respondent). (*Withdrawn*).

2055-81-M: Brown & Huston Limited, (Applicant) v. Labourers' International Union of North America Ontario Provincial District Council, Labourers' International Union of North America, Local 506, and Labourers' International Union of North America, Local 597, Silvestre Jacinto and Edidio Franzoi, (Respondents). (*Withdrawn*).

2102-81-M: United Brotherhood of Carpenters and Joiners of America, Local Union 494, (Applicant) v. The Board of Education for the City of Windsor, (Respondent). (*Withdrawn*).

2141-81-M: A Council of Trade Unions, acting as the representative and agent of Teamsters, Local Union 230, and Labourers' International Union of North America, Local 183, (Applicants) v. McKay Excavating Limited, (Respondent). (*Withdrawn*).

2156-81-M: The Ontario Council of the International Brotherhood of Painters and Allied Trades, (Applicant) v. North York Interior Drywall Systems Limited, Gioia Investments Inc. and Teston Construction Co. Ltd., (Respondents). (*Granted*).

2188-81-M: Labourers' International Union of North America, Local 183, (Applicant) v. Fine Form Construction Company Ltd., (Respondent). (*Granted*).

2191-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787, (Applicant) v. Custom Refrigeration Limited, (Respondent). (*Withdrawn*).

2193-81-M: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and Marble Masons, Tile Layers, Terrazzo Workers Union No. 31, (Applicants) v. Darling Carpet Installations Limited, carrying on business under the firm name and style of Darling Contract Interiors, (Respondent). (*Granted*).

2201-81-M: Labourers' International Union of North America Local 183, (Applicant) v. The Metropolitan Toronto Road Builders' Association and Highway Products Sales Ltd., (Respondent). (*Withdrawn*).

2205-81-M: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and Marble Masons, Tile Layers, Terrazzo Workers Union No. 31, (Applicants) v. Darling Carpet Installations Limited carrying on business under the firm name and style of Darling Contract Interiors, (Respondent). (*Granted*).

2217-81-M; 2218-81-M: International Union of Operating Engineers Local 793, (Applicant) v. Employer Bargaining Agency and its affiliated Lanor Niagara Ltd., (Respondents). (*Withdrawn*).

2236-81-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 1133, 1304, 1747, 1963 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Chairman Mills, (Respondent). (*Withdrawn*).

2238-81-M: Local Union 1190, (Applicant) v. A. C. Joe Bancheri Carpenters, (Respondent). (*Withdrawn*).

2251-81-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. K P Insulation Services Co. Ltd., (Respondent). (*Withdrawn*).

2252-81-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. H & L Industrial Insulation Inc., (Respondent). (*Withdrawn*).

2251-81-M; 2252-81-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. H & L Industrial Insulation Inc., (Respondent). (*Withdrawn*).

2281-81-M: Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. North York Interior Drywall Systems Limited, (Respondent). (*Granted*).

2285-81-M: International Union of Bricklayers & Allied Craftsmen — Local #12, (Applicant) v. Saanich Enterprises Limited, (Respondent). (*Withdrawn*).

2290-81-M: Labourers' International Union of North America Local 183, (Applicant) v. Panza Bros. Constr. Ltd., (Respondent). (*Withdrawn*).

2303-81-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Climb Formwork, (Respondent). (*Withdrawn*).

2310-81-M: Operative Plasterers' and Cement Masons' International Association, Local 172, (Complainant) v. Warren Steeplejacks Limited, (Respondent). (*Withdrawn*).

2312-81-M: Local Union 93, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. R. L. Wilson Engineering & Construction Ltd., (Respondent). (*Granted*).

2313-81-M: The Resilient Floor Workers, Local Union 2965, (Applicant) v. Van Horne Construction, (Respondent). (*Withdrawn*).

2315-81-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Convention & Show Services, (Respondent). (*Withdrawn*).

2317-81-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Anthes Equipment Limited, (Respondent). (*Withdrawn*).

2325-81-M: International Brotherhood of Electrical Workers Local Union 353, (Applicant) v. Best Electric Limited, (Respondent). (*Granted*).

2327-81-M: United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. R. Mordini & Sons Carpentry Limited, (Respondent). (*Withdrawn*).

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